United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7208, 76-7211

United States Court of Appeals

FOR THE SECOND CIRCUIT

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF,

Defendant and Third Party Plaintiff-Appellant and Appellee,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
JUL 21 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

Explanatory note as to numbering of pages of excerpts of testimony.

The excerpts of testimony contained in the appendix consist of whole pages extracted from the original transcript and deposition. Therefore, the testimony of a particular witness intended to be presented for the court's consideration may begin, perchance, in the middle of the cited page. Therefore, to aid the reader of the appendix, brackets have been inserted on those pages which may contain some testimony which is irrelevant to that proposition for which the page is cited. Testimony which is above opening brackets (⌜ ⌝), may be disregarded. Testimony which is below closing brackets (⌞ ⌟), may be similarly ignored. For example:

"1. A. That may or may not
2. have been what happened. I
3. cannot be sure.
4. Q. Do employees receive automatic
5. yearly increases of a general nature?
6. A. Yes.
7. Q. Now, you testified that you
8. had a meeting with Miss Pich and
9. other people at which time you reviewed
10. the personnel files of Mr. Moll and
11. Mr. Gibson, is that right?"

In the above example, therefore, the Court's attention is invited only to the testimony within the brackets (lines 4, 5, 6).

The opening and closing brackets may be on separate pages where, for example, the relevant testimony cited, covers several pages.

The excerpts from the transcript of testimony have been placed and numbered in this Appendix in sequential order.

INDEX

	Page
Docket Entries	1a
Supplemental Summons	6a
Amended Complaint	7a
Answer of Defendant Hoffman Rigging & Crane Service, Inc.	11a
Excerpts from Trial Transcript	13a
Plantiff's Requests to Charge	159a
Court's Charge	163a
Items of Special Verdict	188a
Exceptions to Charge	192a
Verdict	219a
Motions to Amend the Complaint	226a
Motions to Dismiss Complaint	231a
Courts Ruling	300a
Judgment	311a

Index to Witnesses:

Deposition of Peter Ruhstein	17a
Alfred Gomez (Plaintiff)	47a
Direct	47a
Cross	62a
Redirect	108a
Recross	109a
Benito Lopez for Plaintiff	
Direct	115a
Cross	118a

	Page
John Scerenses for Plaintiff	
Direct	124a
Cross	131a
Redirect	136a
William Chester Ash for Plaintiff	
Direct	137a
Cross	141a
Redirect	145a
Defendant's Witnesses:	
Carl W. Hansen	
Direct	148a
Lloyd Spillane	
Cross by Mr. Klonsky	233a
Cross by Mr. Schwartz	239a
Recross by Mr. Klonsky	243a
Leo Hogan	
Direct by Mr. Blanc	244a
Cross by Mr. Klonsky	249a
Cross by Mr. Schwartz	257a
Redirect by Mr. Blanc	267a
Recross by Mr. Klonsky	269a
Recross by Mr. Schwartz	270a
Reredirect by Mr. Blanc	280a
Rerecross by Mr. Klonsky	281a

Page

William Yokum

Direct by Mr. Blanc 283a

Cross by Mr. Schwartz 291a

Redirect by Mr. Blanc 299a

Courts Ruling 300a

69 Civil 1755 Benito Lopez vs. Egan Oldendorf 69 Civil 1755 1a

DATE	PROCEEDINGS	Date Order Judgment N
pr.25,69	Filed complaint and issued summons.	✓
ay 20-69	Filed Notice of Deposition.	✓
une 9-69	Filed summons with marshal's ret. Served Egan Oldendorf c/o Glassal Shipping Corp by Mr. Terboug on 5/19/69.	✓
ul 22-69	Filed Interrogatories.	✓
ul 22-69	Filed Notice of taking Deposition.	✓ C&C
ul 23-69	Filed ANSWER to complaint.	✓
ul 23-69	Filed third party complaint and issued 3rd pty. summons.	
ug/22/69	✓Filed ANSWER to third Party complaint and ounter claims of ITO .	JJC
ug/22/69	Filed summons and return Served as follows" International Terminal Operating Co inc. by Mr.Nolan on 7/25/69 Hoffman Riggins and Crane Service Inc.,b Y Mr.Beckhasen on 8/7/69 in the Dist of N.J. Paul Wilson & Co A/S/ by Mr.Sondheim on 7/29/69	
ug.29-69	✓Filed Supplemental Interrogatories.	
ept.2-69	✓Filed Notice of Motion re: Stay. Ret. 9/16/69.	
ept.2-69	✓Filed Memorandum of Law.	
ep/15/69	✓Filed stip and ordertht aime of third party Deft HoffmanRigging & Crane Service Inc., toanswer to the corss claim of Deft third party ITO is extended to 9/30/69 Frankkel J.	
ep/16/69	✓Filed Memo endorsed on motion ret 9/16/69 Orderd Motionconsented to settle Order on notice. Frankel,J	
ept.16-69	✓Filed consent and order extending Hoffman Rigging and Crane Service Inc.'s time to answer third party complaint to 10/1/69. So ordered. Frankel, J.	
ept.25-69	✓Filed Order granting motion, third party complaint is stayed untilarbitration has been completed,etc. Frankel, J. (mailed notice)	
ct.1-69	✓Filed consent and order extending third party deft. Hoffman Rigging's time to answer third party complaint to 10/15/69. So ordered. Edelstein, J.	
t/7/69	✓Filed stip and order that time for third party Deft Hoffman to answer to the cross complaint of third party deft ITO is extended to 10/21/69 Ryan J.	
t/14/69	✓Filedaffidavit ofservice of Anne Mario Dimino PW	
t/14/69	✓Filed third party deft Hoffman interrogatories to third party deft I.TO. and Paal Wilson Co PW	
ct/14/69	✓Filed 3rd pty deftsinterrogatories to Pltff. PW	
t/14/69	✓Filed afficabyt of service of Linda Ryan	
t/14/69	✓Filed 3rd pty detfHOffman ANSWER to 3rdpty complaint and counterclaim wtih cross claims and a cross complaint.	
ct.17-69	✓Filed Reply to counter-claim of 3rd pty.deft.International Terminal Operating Co.Inc., and Jury demand. PW	
eb.25,70	✓Filed pltff Interrogatories addressed to tha third party deft, Hoffman Rigging and Crane Service Inc. PW crossed out PW crossed out	
ay 4-70	✓Filed pltff's answers to interrogs.	
un.5-70	✓Filed deft's answers to interrogs.	
ul.2-70	✓Filed pltff's affidavit & notice of motion strike answer ret.7-16-70. (Memo included)	
ul. 2-70	✓Filed pltff's notice to take deposition of 3rd.pty.deft.Hoffman Rigging, on 7-17-70.	
ul 15 70	✓Filed stip adjourning motion to strike ans to 8-13-70	
ug.13-70	✓Filed memo.endorsed on motion filed 7-2-70--A sixty(60) day order consented to. Settle order on notice. Tenney, J.	
ug.25-70	✓Filed order that 3rd.pty.deft.Hoffman Rigging & Crane serve its answers to pltff's interrogs within (60) days or default judgment shall be entered. Tenney,J.	

cont'd on page 2

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DATE	PROCEEDINGS
Sept.23-70	Filed consent order substituting attys. for 3rd pty Hoffman Rigging & Crane.-- --McLean,J.
Oct 6- 70	Filed Pltff's Notice of entry of Order filed Aug. 25-1970.
Oct.20-70	Filed 3rd party deft Hoffman Rigging and Crane Service, Inc. answers to interrogs
Nov. 12-70	Filed 3rd party deft. International Terminal Operating Co , Inc., Notice to take deposition of 3rd party deft. Hoffman Rigging and Crane Service, Inc., on 12-15-70.
Nov.25-70	Filed 3rd party deft. Hoffman Rigging and Crane Service, Inc., notice to take deposition of 3rd party deft. International Terminal Operating Co., Inc., on 12-15-70.
Jan 12-71	Filed 3rd party defts' Hoffman Rigging & Crane Service Inc. notice for discovery & inspection of documents to International Terminal Operating Inc.
Jan 12-71	Filed third party deft Hoffman Rigging & Crane Service Inc. notice for discovery & inspection of documents to 3rd party deft Hoffman Rigging & Crane Service
Jan 12-71	Filed third party deft's Hoffman Rigging & Crane Service Inc. notice for discovery & inspection of documents to pltff
Jan 13-71	Filed third-party deft. HOFFMAN RIGGING & CRANE SERVICE, INC. Supplemental Inter
Jan.20-71	Filed pltff's Response to notice for discovery and inspection of the Third Party Deft. Hoffman Rigging And Crane Service, Inc.
Feb.25-71	Filed stip and order that the time for International Terminal Opera Co., Inc., to answer notice of discoveryand Inspection and supplemental Interrogs. is ext. to 3-19-71. Frankel, J.
Mar.9-71	Filed deft. and 3rd party pltff. answers to interrogs. propounded by 3rd party deft. Hoffman Rigging & Crane Service Inc.
Mar.9-71	Filed deft. and 3rd party pltff. Supplemental Answers to Interrogs. by 3rd party deft. Hoffman Rigging & Crane Service, Inc.
Mar.19-71	Filed 3rd party deft. International Terminal Operating Co., Inc. response pursuant to Rule 34
Apr.1-71	Filed 3rd party deft, Hoffman Rigginh & Crane Service, Inc. affdvt. and notice of motion Re; Compel Discovery & Inspection. Ret.4-8
Apr.1-71	Filed 3rd party deft. Hoffman Rigging Memorandum of law.
Ap .7-71	Filed stip. that the motion to compel discovery and inspection for Hoffman Rigging & Crane Service, Inc. returnable 4-8-71 is adjourned to 4-29-71.
Apr7-71	Filed stip. between 3rd party deft. Hoffman Rigging & Crane Service Inc., and International Terminal Operating Co., Inc. that motion to compel discovery and inspection returnable 4-8-71 is adjourned to 4-29-71.
Apr.28.71	Filed stip between 3rd party defts' Hoffman Rigging and Internation Terminal that the motion to compel discovery etc. is ext. from 4-29-71 to 5-13-71
May 12-71	Filed affdvt. of Joseph A. Cohen, for 3rd party deft. International Terminal Operating Co.,Inc. in opposition to the motion by the 3rd party deft. Hoffman Rigging & Crane Service, Inc. compelling certain discovery and inspection.
May 12-71	Filed 3rd party deft. International Terminal Memorandum of Law.
May 13-71	Filed Memo Endorsed on motion filed 4-1-71- Motion disposed of following argument in accordance with the Court's ruling. Submit order. Tenney, J.
May 21-71	Filed order that the third -party deft. International Terminal Operating Co., Inc., produce for inspection, copying or photographing by the third party deft. Hoffman Rigging & Crane Servi Inc., as indicated. Tenney, J. M/N

DATE	PROCEEDINGS	Date O Judgme
Jun 3-71	Filed notice of entry of an order (copy filed in court 5-20-71	
Jun 25-71	Filed stip and order that 3rd pty deft International Terminal Operating Co. time to produce for discovery and inspection is extended to 7-6-71 McLean J.	
Jul 12-72	Filed Notice of change of address of Cichanowicz & Callan to 80 Broad St.NY 10004	
Mar.9,73	Filed Notice of Change of Address of 3rd Pty Deft.Hofman Rigging& Crane Service,Inc.	
7/8/74	Pre-trial before Palmieri	
9/9/74	Continued to Palmieri Pollack J	
Nov.6-74	Filed pltffs supplemental answers to interrogs.	
NOV 8-74	PRE-TRIAL CONFERENCE HELD BY Griesa, J	
Mar. 20-75	Mailed notice of reassignment.	
Apr. 1-75	Filed deft. 3rd pty pltff's supplemental answers to interrogs.	
Apr 4,75	Filed Dft. & 3rd Pty Pltff. Answer to counterclaim of 3rd Pty dft. International Operating Co.,Inc.	CC
Apr 4,75	Filed Deft. & 3rd Pty Pltff. Answer to counterclaim of 3rd Pty deft. Hoffman Rigging & Crane Service Inc.	CC
4-2-75	PRE-TRIAL CONFERENCE HELD BY Schuebel	
Apr 24.75	Filed Pltffs. Notice of Deposition of N.Y. Medical College,Flower & Fifth Avenue Hospital on 4/30/75.	
Apr 30.75	Filed 3rd Pty deft. International Terminal Operating Co.,Inc. answers to interrogs. propounded by Hoffman Rigging & Crane Service Inc.	
4-29-75	PRE-TRIAL CONFERENCE HELD BY Schuebel	
5-7-75	PRE-TRIAL CONFERENCE HELD BY Schuebel	
May 14.75	Filed Deft. & 3rd Pty Pltff. Egon Oldendorf Pretrial Memorandum.	
6-2-75	PRE-TRIAL CONFERENCE HELD BY Schuebel	
6-11-75	PRE-TRIAL CONFERENCE HELD BY Schuebel	
6-20-75	PRE-TRIAL CONFERENCE HELD BY Schuebel	
07-03-75	Filed 3rd Pty deft. ITO Interrogs.to Hoffman Rigging & Crane Service Inc.	
07-03-75	Filed 3rd Pty deft. ITO Further Answers to interrogs. to deft. Hoffman Rigging & Crane Service.	
08-31-75	Filed 3rd Pty Deft. Answer to Interrogs. by International Terminal Operating Co.,Inc. 3rd Pty Deft.	
01-26-76	Filed deft and third party pltffs supplemental pretrial memorandum.	
01-26-76	Filed defts supplemental answers to interrogatories.	
01-30-76	Filed pltffs trial memorandum .	
02-05-76	Filed Transcript of Record of Proceedings dated 2-3-76.	
Feb3-76	Trial begun with a jury as to the main case only. *(Pltff vs Oldendorf.	
	Feb 4-76 Trial Contd.	
	Feb5-76 Trial Contd.	
	Feb2 76 Trial Contd. Feb 10-76 Trial Contd and Concluded (Main Case only) Verdict for the pltff against deft Oldendorf, Keseling.	
2-17-76	Filed Answer of third party deft Paul Wilson & Co. to the cross claim of third party deft Intl Terminal Operating Co. Inc.	
2-17-76	Filed Answer of third party deft Paul Wilson & Co. to the cross claim of third party deft Hoffman Rigging & Crane Service, Inc.	
2-18-76	Filed Trannscript of Record of Proceeding .	
2-19-76	Filed supplemental summons.	
2-20-76	Filed Affidavit & Notice of Motion of deft and third party pltff for an order setting aside and vacating the jury verdict finding the deft negligent, etc, as indicated rtble before Wyatt, J. on 3-5-76.	
2-20-76	Filed Affidavit & Notice of Motion by third (3rd) party deft for an order for judgment to be entered in favor of the deft, etc, as indicated rtble on 3-20-76 before Wyatt, J.	

D. C. 110 Rev. Civil Docket Continuation

4a

DATE	PROCEEDINGS	Date Order Judgment No
2-19-76	Filed Judgment # 76, 143: Ordered that pltff have judgment aglanst deft in the amount of $310, 250 etc, as indicated. Wyatt, J. Clerk. 2-19-76.	
2-27-76	Filed pltffs affidavit in opposition to defts motion purs to Rule 50 (b) for an order setting aside the unanimous verdict of a jury and judgment entered thereon, etc, as indicated.	
3-5-76	Filed Affidavit of deft and third party pltff in support of defts claim for costs and disbursements incurred in defense of this action including reasonable counsel fees etc as indicated.	
3-8-76	Filed memo endorsed on motion filed 2-20-76. Motion denied. Wyatt, J. M/N.	
3-8-76	Filed memo endorsed on motion filed 2-20-76. Motion denied. Wyatt, J. M/N.	
3-8-76	Filed memo endorsed on motion filed 2-13-76. Motion denied. Wyatt, J. M/N.	
3-11-76	Filed Transcript of Record of Proceedings, dated 2-10-76.	
3-12-76	Filed Pre Trial Order (Consented To). Wyatt, J.	
3-12-76	Filed Pltffs pre trial memorandum.	
3-12-76	Filed Pltffs supplemental Pre Trial memorandum.	
3-12-76	Filed Pre Trial memorandum of Intl Terminal Operating Co. Inc,	
3-12-76	Filed supplemental pre trial memorandum of third party deft. Hoffman Rigging & Crane Service, Inc.	
3-12-76	Filed pre trial memorandum of Hoffman Rigging & Crane Service, Inc. third party Defts.	
3-12-76	Filed further supplemental pre trial memorandum of Intl Terminal Operating Co. Inc.	
3-12-76	Filed Third party deft Intl Terminal Operating Co. ins supplemental(trial-Pre) memorandum.	
3-12-76	Filed affidavit of Engagement by Intl Operating Co. Inc. as indicated.	
3-12-76	Filed memorandum of law of deft and third party pltff in support of the third party claim for indemnity.	
3-12-76	Filed trial memorandum on behalf of third party deft Hoffman Rigging and Crane Service, Inc.	
3-12-76	Filed Affidvit & Stipulation of third party dft to, as indicated.	
3-12-76	Trial on counterclaims settled upon 2-10-76. Decision of the Court, orally in open Court. Judgment to be submitted. J. Kissling.	
3-25-76	Filed Judgment # 76, 270. Ordered that pltff Benito Lopez recover of the defts Egan Older & Hoffman Rigging & Crane Service, Inc. the sum of $310,250 with interest from 2-19-76 and his costs of the actions jointly and severally, and it is further ordered that Judgment # 76, 143, previously entered is hereby withdrawn and it is further ordered and adjusged that deft and third party Pltff E an Oldendorf, if it pays the juedgment herein, be fuly indemnified by the third party deft, Intl Terminal Operating Co. Inc. and Hoffman Rigging & Crane Service, Inc. each for the sum of $155, 125.00 togehther with interest thereon, and one half the sum to be taxed as costs in favor of the pltff, Benito Lopez and further ordred that deft Hoffman Rigging & Crane Service Inc. if it pays the mdgment herein recover of the third party deft Intl Terminal Operating Co. Inc. the sum of $155, 125. 00 together with interest thereon and one half the sum to be taxed as costs in favor of the pltff Benito Lopez against said deft. and further ordered that the adtion by Egan Oldendorf against Paal Wilson & Co. As. be and is hereby discontinued without prejudice and that the various crossclaims interposed by third party deft Intl Terminal Operatin Co. Inc against persons named and the conterclaim of Intl Terminal Operatin Co. Inc. interposed against the shipowner, Egan Oldendorf, ared dismissed and it is further ored ed that cross claims interposed by deft and third party deft Hoffman Rigging & Crane Service Inc. against Paal Wilson & Co. A. S. and the counterclaim of Hoffman Rigging and Crane Service Inc. interposed against the shipowner, Egan Oldendorf, are dismissed. Clerk. Judgment Entered 3-25-76 Approved Wyatt, J. M/N	
4-23-76	Filed Notice that the third party deft Intl Terminal Operating Co. Inc. appeals to the U.S.C.A.2. from the final judgment #76, 270 dtd 3-25-76. M/N	

Cont'd

BENEFOLDER V. IVAN OLDENDORFF ETC
P C 11

DATE	PROCEEDINGS	Date Order or Judgment Note
4-23-76	Filed Notice that the third party deft. Hoffman Rigging and Crane Service appeals to the U.S.C.A.P. from the order adding it as a deft. and from so much of the judgment entered on 3-25-76 as indicated. M/N.	
4-23-76	Filed Notice that pltff cross appeals from so much of the final Judgment #76,270 herein as reduced damages for contributor negligence by 15% to the U.S.C.A.P. this date. M/N.	
23-76	Filed Notice that deft and third party pltff Ivan Oldendorf appeals to the U.S.C.A.P. from the Final Judgment entered on 3-25-76 etc, as indicatedd M/N	
5-5-76	Filed supersedeas Bond in the sum of $244, 628.00 on Judgment No. 76, 270 by deft and third party deft Hoffman Rigging and Crane Service, Inc. as indicated.	
5-21-76	Filed Notice tha the record on appeal has been certified and transmitted to the U.S.C.A.P. this date.	
2-3-76	~~Filed transcript of record of proceedings, dated~~ 2-3-76.	
Jun 7-76	Filed transcript of proceedings dated Feb. 3,4,5,9, & 10-1976.	
Jun 7-76	Filed transcritp of proceedings dated Mar 8-76.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

6a

69 CIVIL ACTION FILE NO. ~~1755~~ (IBW)

BENITO LOPEZ,

Plaintiff

v.

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

Defendants.

SUPPLEMENTAL SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

DI COSTANZO, KLONSKY & CUTRONA, P.C.

plaintiff's attorneys, whose address is: 66 Court Street
Brooklyn, N.Y. 11201

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT
Clerk of Court.

BY: _____
Deputy Clerk.

Date: [Seal of Court]

NOTE: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENITO LOPEZ, Plaintiff,	:	
-against-	:	AMENDED COMPLAINT
EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC., Defendants.	:	69 CIV. 1755 (IBW)

Plaintiff complaining of the defendants by his attorneys DI COSTANZO, KLONSKY & CUTRONA, P.C., respectfully alleges as follows:

AS AGAINST DEFENDANT EGAN OLDENDORF

1) Plaintiff repeats and realleges all of the paragraphs of the complaint against said defendant, and incorporates same herein by reference.

AS TO THE DEFENDANT HOFFMAN RIGGING & CRANE SERVICE, INC.

2) The plaintiff repeats and realleges all of the foregoing paragraphs of the complaint as alleged against the defendant Egan Oldendorf, as if set forth herein at length, and in addition thereto alleges as follows:

3) That at all the times hereinafter mentioned the defendant was and still is a citizen of the United States, incorporated in the State of New Jersey.

4) Jurisdiction is founded on the admiralty and maritime nature of the claim, within the meaning of Rule 9(h) F.R.C.P., and other applicable statutory provisions.

5) That the defendant Hoffman Rigging & Crane Service, Inc., by its attorneys, when impleaded by the defendant Egan Oldendorf on or about July 31st, 1969, responded to the plaintiff's complaint and fully pursued its defenses as if directly sued by plaintiff, and engaged in all proceedings, discovery and trial, as if a direct defendant within the meaning of Rule 14(a) and 15(b).

6) That Rule 14(a), F.R.C.P. pertinently states as follows:

> ..."The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff..."

and Rule 15(b) provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues..."

7) That the plaintiff moved the trial Judge for leave to serve an amended complaint on Hoffman Rigging & Crane Service, Inc., for a direct action in negligence, and same was granted.

8) That on or before the 21st day of October, 1968, the defendant Hoffman Rigging & Crane Service, Inc., had been hired to provide a crane and personnel to discharge a cargo of steel beams from the M/V "JOBST OLDENDORF".

9) That on or about the 21st day of October, 1968, in the course of discharging steel beams from a hold of the aforementioned vessel, the plaintiff was caused to suffer severe, painful, permanent injuries, by reason of the carelessness, recklessness and negligence of the defendant by its agents, servants and/or employees, in failing to heed and follow the proper signals, and in causing a sudden movement of the draft upon a loossely stowed beam which thereupon toppled upon the person of the plaintiff, all without any fault or contributory negligence on the part of the plaintiff.

10) That the trial herein concluded on February 10, 1976 with a special verdict in favor of the plaintiff against the shipowner Egan Oldendorf in the gross amount of $365,000.00, reduced by a 15% finding of contributory negligence to $310,250.00, on which judgment has been entered herein.

11) That all pertinent parties had agreed that the indemnity causes of action, and the cross-claims between defendant-shipowner and third-party defendants, be determined by the Court without a jury.

WHEREFORE, the plaintiff demands judgment against the defendant Hoffman Rigging & Crane Service, Inc., in the amount of $500,000.00 or for the full amount of any judgment, together with costs and interest.

DATED: Brooklyn, New York
February 18, 1976

Yours, etc.,

DI COSTANZO, KLONSKY & CUTRONA, P.C.

BY: Robert Klonsky
Member of the Firm
Attorneys for Plaintiff
66 Court Street
Brooklyn, N.Y. 11201

TO:-

CICHANOWICZ & CALLAN, ESQS.
Attorneys for Defendant Egan Oldendorf
80 Broad Street
New York, N.Y. 10004

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third Party Defendant I.T.O.
801 - 2nd Avenue
New York, N.Y. 10017

HILL, BETTS & NASH, ESQS.
Attorneys for Third Party Defendant Hoffman Rigging & Crane Service
One World Trade Center
New York, N.Y. 10048

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENITO LOPEZ, Plaintiff, -against- EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC., Defendants.	69 Civ. 1755 (IBW) ANSWER

Defendant HOFFMAN RIGGING & CRANE SERVICE, INC., by its attorneys, HILL, BETTS & NASH, answering the amended complaint of the plaintiff herein, alleges upon information and belief:

FIRST: Admits the allegations contained in paragraphs "3" and "10".

SECOND: Denies the allegations contained in paragraphs "4", "5", "6", "7", "9" and "11".

THIRD: Denies the allegations contained in paragraph "8", except admits that the third-party defendant INTERNATIONAL TERMINAL OPERATING CO., INC., provided a crane and personnel to discharge a cargo of steel beams from M/V JOBST OLDENDORF.

AS AND FOR A FIRST DEFENSE

FOURTH: That the plaintiff's cause of action is time barred because the inexcusable delay in instituting suit has materially prejudiced said defendant.

AS AND FOR A SECOND DEFENSE

FIFTH: That any injury suffered by the plaintiff,

as alleged in the amended complaint, was due wholly or in part to the want of care, default or negligence of the plaintiff, and not to any want of care, default or negligence on the part of said defendant, its agents, officers, servants or employees, or others for whom it may be responsible.

AS AND FOR A THIRD DEFENSE

SIXTH: That any injury suffered by the plaintiff, as alleged in the amended complaint, was due to an open, known risk and normal circumstance of his employment which was assumed by the plaintiff, and for which said defendant is not responsible.

WHEREFORE, said defendant demands judgment dismissing the amended complaint herein, together with the costs and disbursements of this action.

HILL, BETTS & NASH

By: /s/ Robert S. Blanc
A Member of the Firm
Attorneys for Defendant
Hoffman Rigging & Crane Service, Inc.
Office & P. O. Address:
One World Trade Center, Suite 5215
New York, N.Y. 10048

MR. KLONSKY: I think you are right.

MR. BLANC: I think that is correct, your Honor.

THE COURT: Apparently Hoffman's arrangements were all with ITO long antedating the date of this accident. Back in 1967 Hoffman makes an agreement with ITO and it is to govern whenever they lease cranes at Port Newark.

Then on the day of this accident, the customers named on one of Hoffman's cards is given as ITO and on the other is Norton Lilly.

Am I to assume that Norton Lilly really has no connection with this matter and that we treat Hoffman as being engaged by ITO?

MR. BLANC: That is correct, your Honor.

THE COURT: Right, Mr. Cohen.

MR. COHEN: Yes, sir.

THE COURT: Okay. So ITO engaged Hoffman. Hoffman supplied the crane and the operator --

MR. BLANC: And the oiler.

THE COURT: And the oiler.

And as between Hoffman and ITO, it probably -- there is no agreement as to what the arrangement was, is there?

In other words, was Hoffman in control of the

crane and its operation or was ITO?

MR. BLANC: That is the disputed issue.

THE COURT: Is that right? That is an issue.

MR. KLONSKY: I don't think it makes any difference as far as the plaintiff's case is concerned.

THE COURT: I understand, but I am just trying to piece these things together.

Who is Albano?

MR. BLANC: He is an employee of ITO.

THE COURT: So the shipowner brings in Wilson, Hoffman and ITO. Then ITO files a counterclaim against the plaintiff.

Could you tell me what the theory of the counterclaim is?

MR. COHEN: It has been held not to be good in this circuit, your Honor.

MR. KLONSKY: It should be excised from the case.

THE COURT: Really?

MR. COHEN: It is not good law in this circuit.

THE COURT: What about ITO, do you agree, Mr. Blanc?

MR. BLANC: You mean Hoffman.

The unseaworthiness does not preclude the recovery of indemnity or in any way affect the amount of the recovery against the stevedore.

I think that, your Honor, would require a little more research or a little more law.

THE COURT: All right.

Then the stevedore made a claimover against Hoffman and Wilson.

Finally, Hoffman made a claim against the shipowner, the stevedore and Wilson. As a matter of fact, it made two separate claims against the shipowner, four separate claims against the stevedore and four separate claims against Wilson with a jury demand.

Are we trying to the jury anything except the plaintiff's claim against the shipowner?

MR. BLANC: We are not, your Honor.

THE COURT: All right.

Mr. Cohen, do you agree?

MR. COHEN: That was my understanding, your Honor.

THE COURT: All right.

Mr. Cichanowicz, I suppose you agree?

MR. CICHANOWICZ: Yes, sir.

THE COURT: You are out of it, Mr. Klonsky, but do

witness.

So a deposition means the recorded out of court in advance of trial testimony of a witness which is read into evidence so that you can hear and consider it as if the witness were here present in the flesh.

If you want to use your colleague to read the answers, Mr. Klonsky, you may, or if you prefer to read both questions and answers, either way you want to do it.

MR. KLONSKY: I have to skip quite a bit so I might as well do it myself.

THE COURT: You certainly may.

MR. KLONSKY: Do you have the exhibits that were used on this deposition?

MR. CICHANOWICZ: I think I have, yes.

MR. KLONSKY: This is an examination, the deposition of Egan Oldendorff, by Peter Ruhstein, taken by the third-party defendant Hoffman Rigging and Crane Service, Inc., pursuant to notice, at the offices of Hill, Betts & Nash, One World Trade Center, New York, New York, before Thomas H. Cole, a Certified Shorthand Reporter and Notary Public of the State of New York.

This was taken on March 4, 1975, at 2:30 p.m..

Present was Robert Klonsky, one of the attorneys for the plaintiff.

"A Since 15 August last year.

"Q Who was your employer prior to August 15, 1974?

"A Before last year it was Container Terminal in Hamburg.

"Q How long did you work at the Container Terminal?

"A Two years.

"Q Was that beginning about the summer of 1972?

"A Yes, correct.

"Q For whom did you work before you went to work at the Terminal?

"A For a company, Egan Oldendorff, shipowners.

"Q When did you first go to work for Egan Oldendorff?

"A 1961 or 1962.

"Q What ratings did you have while you were working for that company beginning in 1961 or 1962?

"A Third mate, second mate, chief mate and master.

"Q When did you become master?

"A First of August, 1967."

"Q Were you the master on the MV Jobst Oldendorff on October 21, 1968?

"A Yes.

"Q Was it reported to you on that date that an

accident had occurred to a longshoreman by the name of Benito Lopez?

"A Yes."

May I read from a sitting position, your Honor?

THE COURT: You may.

BY MR. KLONSKY:

"Q Who reported the accident to you?

"A The first mate, Reinhard Ott.

"Q What did he report to you about the accident?

"A He came up to me and he says he thinks that on hatch number one an accident had happened, and he wants me to come down.

"Q At what time on that date did the chief officer report the accident to you?

"A I saw from the logbook now that the accident happened at 8:17 and it must have been a few minutes later that the report was made to me."

I will turn to page 10, line 19:

"Q Did you go to the number one hold with the chief officer after he reported this accident to you?

"A Yes.

"Q What did you see when you got to number one hold?

"A I saw the injured man lying there. Several

stevedores attended to him. They tied the leg and they calmed him. And that is what I saw."

Line 20:

"Q What was the length of that beam that fell on his leg?

"A Twenty-seven feet.

"Q Are you referring to your workbook?

"A No. These are notes that I culled from some records that I looked into in Lubeck a few days ago."

Page 12, line 9:

"Q What was the thickness of that piece of steel?

"A 14 times 16 inches.

"Q What was its weight?

"A 2.6 tons.

"(Discussion off the record.)

"Q Will you describe the beam for us?

"A A H-profile beam. Sometimes it's referred to as an I-profile."

Page 13, line 9:

"Q When had the vessel arrived at that dock prior to the accident date?

"A It was October 21 at 7:30.

"Q Is that a.m.?

"A a.m."

Page 14, line 3:

"Q Was any dunnage used in connection with the stowage of that steel?

"A Yes.

"Q Where was the dunnage placed?

"A Between the individual beams, metal beams.

"Also in between the individual beams cross-wise, those who could not have been firmly fixed in order to make it firm.

"Q Was the steel chocked in any way?

"A Yes.

"Q Where were the chocks placed?

"A All over, wherever there were openings, these chocks wer put in-between.

"Q Was there dunnage between the various layers of beams?

"A Yes.

"Q And was there dunnage between the bottom beam and the deck?

"A Yes.

"Q Were the beams lashed?

"A Yes, the lashings were removed before the unloading. They were unlashed and unclocked.

"Q Who removed the lashings?

"A The ship's crew.

"Q Where had that steel been loaded into that hold?

"A In the Middlesbrough, England.

"Q Who stowed it?

"A Stevedores. The company is not known to me.

"Q I show you this document on one sheet and ask you if you can identify it (handing)?

"A That is the stowing plan of this merchandise.

"MR. BLACN: Please mark that Third-Party Defendant Hoffman's Exhibit D for identification."

Do you have a copy?

MR. CICHANOWICZ: Yes (handing).

MR. KLONSKY: I ask that this be marked in evidence.

THE COURT: Any objection?

MR. CICHANOWICZ: No objection.

THE COURT: All right. Without objection it will be received.

Mark it Plaintiff's Exhibit 1.

xxxx (Plaintiff's Exhibit No. 1 was received in evidence.)

THE COURT: Plaintiff's 1 is the stowing

"A Number three."

(Pause.)

THE COURT: Mr. Clerk, will you take the exhibit.

All right, Mr. Klonsky.

MR. KLONSKY: On page 18, line 5.

"Q Are there steel beams that were not I-beams?

"A Yes, they call it here 'steel angles.'"

Now go to page 21, line 15:

"Q Were any of the ship's officers or crew in the hold at the time of the discharge of the steel?

"A If you mean the whole time of the unloading, yes. Then the answer would be yes."

Page 22, line 2:

"Q Were any of the vessel's officers or crew in the hold before the discharge of cargo began that morning?

"A At any rate, the people who took off the lashings and the first officer and the surveyor who came down to inspect the cargo.

"MR. KLONSKY: This is before the longshoremen came aboard, is that true?

"A The unlashing, yes. But the first officer

was in the hold when the stevedores came aboard.

"Q Was the first officer in the hold when the first draft of steel was being discharged from the hold that morning?

"A I can't answer the question, because I don't know whether the draft that caused the accident was the first draft.

"Q Was the chief officer in the hold when the draft involved in the accident was being discharged that morning?

"A No.

"Q Was any other officer or crew member in the hold at the time of that draft's being discharged?

"A No.

"Q Was the chief officer on deck near the hatch opening at the time that draft was being discharged?

"A According to the report that I read, he was at that time at the boat deck in order to give the order to the bos'n.

"Q How far was the boat deck from number one hold?

"A About 75 meters."

Line 21:

"Q Can you identify this document as the vessel plan?

"A You can take it from the plan, because the scale is right there.

"Q What does the scale show the distance to be?

"A 75, approximately (measuring)."

Your Honor, I ask the Court to take judicial notice that a meter is 39 inches or 3.3 feet.

THE COURT: Any question about that? I haven't looked it up.

MR. CICHANOWICZ: I haven't looked it up, either.

THE COURT: Subject to correction, I will take Mr. Klonsky's word for it.

A meter is how much?

MR. KLONSKY: 3.3 feet or 39 inches.

THE COURT: 3.3 feet?

MR. KLONSKY: That is correct, sir.

THE COURT: A meter is equal to 3.3 feet, unless it is corrected after we look it up.

BY MR. KLONSKY:

"Q Was any other deck officer or crewman on the deck on the starboard side of number one hatch at the time that draft was being raised?

"A No, there was nobody of the crew nearby, as I established later, as I questioned them, and I got

negative replies."

Turn to page 27. This is Mr. Blanc still continuing with his direct examination.

"Q I show you a statement on three pages of yellow paper and ask you if the handwriting in the statement itself is your handwriting?

"A No.

"Q To whom did you give that statement?

"A To a representative of Cichanowitz' firm.

"Q I refer you to the third page and ask you if that representative's name appears on that page?

"MR. CICHANOWICZ: If you know.

"A I don't know.

"Q Does your signature appear on that page?

"A My signature appears."

Thatwas marked Third-Party Defendant Hoffman Exhibit F for identification.

I offer this in evidence, your Honor.

THE COURT: All right. Show it to Mr. Cichanowicz.

MR. CICHANOWICZ: I have no objection.

(Pause.)

THE COURT: Any objection?

MR. CICHANOWICZ: No.

shelter deck encloses part of it that is not covered by the hatch opening.

"I have to correct it. It's not the shelter deck, it's the main deck. This is the main deck (indicating).

"Q The main deck covered part of the hatch, you say?

"A Part of the hold.

"Q I see. Now, which side of the vessel was toward the dock?

"A Port side.

"Q And what side of the vessel was the stow being taken from, the draft that was involved in this accident?

"A From the starboard side.

"Q And which way would the men go to protect themselves when the draft was being lifted?

"A It would be most favorable to go to the far starboard side.

"Q Was there a wing in the far starboard side?

"A I don't know exactly how to call it. It is possible to go farther to the starboard side, beyond where the beams were stored.

"Q These beams in the draft were 60 feet long, were they not?

"A Yes.

"Q Were all the steel beams which you designated as profile II or profile I 60 feet long?

"A No.

"Q Was there a dividing bulkhead in the hatch at the time of the accident?

"A There is one center bulkhead from the stern up to the hatch opening.

"Q From the stern up to the hatch opening? I don't follow that. Where is the stern with respect to the hatch opening?

"A This is a bulkhead, firm, dividing number one and two hold, or there is another firm bulkhead going fore and aft.

"Q How far in does it go fore and aft?

"A Only as far to the winch house, only as far as the hatch opening goes.

"Q How many feet is that?

"A 4.3 meters.

"Q How much is that in feet?

"A About 13 feet.

Q Did any part of it go into the hold itself, this bulkhead?

"MR. BLANC: You mean into the hatch opening.

"Q Yes, into the hatch opening.

"A Do you mean the hatch opening?

"Q Yes, the hatch opening.

"A No, it doesn't reach that far.

"Q Was there any temporary bulkhead put up there?

"A It was not put in at that time.

"Q Now, the piece of steel that fell over on the plaintiff's leg, where was that located?

"A On the port side, close to the middle bulkhead of which we just have been talking.

"Q And the plaintiff, was he on the port side of the bulkhead or starboard side of the bulkhead when you first saw him?

"A He was on the port side.

"Q Close to the inshore, is that it?

"A Yes.

"Q And this particular beam, did it come from a stow of beams that were there located?

"A I didn't understand.

"Q This beam that fell on the foot of the plaintiff, did it come from a stow of beams that were located there at that area?

"A He was there originally."

It should be "it" was there originally.

THE COURT:Is that agreed?

MR. CICHANOWICZ: Yes, sir.

THE COURT: All right, it is agreed, then.

The answer is "It was there originally".

BY MR. KLONSKY:

"Q And how many beams were in that particular area?

"A I couldn't tell you that.

"Q Had they already been unlashed by the crew members?

"A Yes.

"Q Did you notice particularly whether there was any dunnage for these beams?

"A I can only answer in this way: that when the cargo was stowed, we paid particular attention that everywhere a sufficient dunnage should be placed.

"Q I asked you whether at the time of the accident when you looked down, did you see any dunnage at this particular stow, the stow from which the beam fell that came upon the leg of the plaintiff.

"A I don't remember that.

"Q And was this --"

THE COURT: Wait. Can we agree what dunnage is?

"A I couldn't give you any subdivision of this sotwage. Everything was stowed in one.

"Q Was this the first port of discharge after the hold was stowed?

"A Yes.

"Q It was the entire stow supposed to go off here in Port Newark?

"A No, part of the cargo,namely the steel plates, were destined for New Haven.

"Q What about the part of the stow from which the beam fell upon the plaintiff's foot? Was that destined for New Jersey Port?

"A No.

"Q Where was that to the discharged?

"A Sorry, was a misunderstanding.

"The whole that can be reached from the top was supposed to be discharged in Newark.

"Q You mean all the I or H-beams?

"A Yes.

"Q Was this a solid stow of beams or were there separations between them?

"A It was stowed all together, For instance, the beams that were the same length werestowed together and then when another, when cargo of a different length came,

of different dimensions came, then by the nature of the kind of the cargo, a separation or division came about naturally.

"Q Now, with particular reference to the area where the beam fell overon the foot of the plaintiff, what were the dimensions of those beams?

"A It was 27 feet in length, was the beam that fell on the foot of the plaintiff. But on the same level, seen athwart the ship. There was also the other beams of different dimensions.

"Q Wasn't this area stowed on edges and somewhat higher than the other beams in the same area?

"A (No response.)

"Q Wasn't the beams in this area where the accident happened stowed on edges and somewhat higher than the other beams in the same area?

"A Well, the 60-foot beams were smaller in extent than the 27-foot beams.

"Q Smaller in what?

"A In extent (drawing)

"The H-beam, the one that fell the 60 feet --

"Q Let us tart again.

"A The 27-foot beams are bigger or higher as you look at the profile than the 60-foot beams. They are smaller

in height."

Page 38, line 2:

"Q Were these beams, the 27-foot beams, stowed with the height greater than the base?

"A Yes.

"Once again, to make it clear, we are trying at this kind of cargo, to keep a smooth, plain surface. But if you stow beams that are higher next to beams that are lower, an unevenness naturally results.

"Q Wasn't there an unevenness here?

"A Yes. Yes.

"Q Now, how distance was the edge of the 27-foot beams, the stow that is, of the 27-foot beams from any other stow of a different dimension beams?

"A It was stowed compactly as close --

"Q Together --

"A -- as close as possible, as compactly together as possible.

"Q You say there was no separation between any of these stows, of beams of different dimensions?

"A Dimensions, you mean the --

"Q 27-foot from the 60-foot or others.

"A No, divisions only those which would result from the way it is being stowed.

"Q Now, give me the dimensions of the square of this hatch, please.

"A It is 7.99 meters by 8.60 meters.

"Q Will you please break this down into feet?

"A Roughly 55 by 26.

"Q And how deep was this hatch from the main deck down?

"A 5.65 meters.

"Q How many feet?

"A About 17 feet.

"Q And did this hatch have winches and booms?

"A Yes.

"Q Whose decision was it to use the shore crane instead of the ship's winches?

"A The time charterer has to answer this question. We didn't have anything to do with it.

"Q Don't you have something to say about how your cargo is to be discharged?

"A No.

"Q What was the capacity of your booms at the number one hatch?

"A On the stern side, it was three to ten tons and the forward, three to five tones. And three to ten means double rigged gear, single rigged gear.

"Q Did you have enough strength with your equipment to remove these beams?

"A Yes.

"Q And your winches, what were they, steam or electric?

"A Electric.

"Q In other words, it was a modern winch, wasn't it?

"A Yes.

"Q Did you use the ship's equipment in any way to handle the cargo other than remove it from the ship?

"A I don't understand the question.

"Q To bring it out from a wing, for example?

"A I don't understand, I still don't understand this question. It's in disconnection.

"Q For this method of discharge, did you have any use of the ship's equipment to bring the cargo into a position where the crane could take over?

"A I understand it now.

"On that day, the ship's own equipment was not used at all.

"Q Was there another hatch being worked the same day?

"A Yes. Number two.

we will either excuse the jury or handle it in some way so that you can make your point to me in the absence of the jury.

MR. BLANC: Thank you, your Honor. That is very good.

THE COURT: Anything else?

MR. COHEN: No, your Honor.

THE COURT: Okay.

(In open court; jury present.)

All right, Mr. Klonsky.

MR. KLONSKY: Your Honor, the stage we were at yesterday was at page 43.

May I continue reading?

THE COURT: You may.

MR. KLONSKY: Thank you, sir.

THE COURT: My copy has been sent downstairs, but I have just arranged to have it brought back.

MR. KLONSKY: Line 13.

"Q Was there an assignment of a particular ship's officer for that area of the ship during the cargo operation?

"A The first officer, cargo officer, is responsible to the ship for all loading and unloading operations.

"Q Yes, but is there an assignment of other officers for a portion of the ship where the work is done; more specifically than the first officer.

"A Yes, both other officers support the first mate in this work.

"Q There were two hatches being worked. Who was assigned to the number one hatch at the time of the accident?

"A There is no specific designation. The first officer surveys the whole operation and if he goes away, he just tells somebody to keep an eye on it and inspect.

"Q When the first officer was 75 meters away from the hatch where the work was being done, was there any other officer at the hatch?

"A As I read from the report of the first officer, the second officer was at this time in hold number two.

"Who was at number one?

"A Nobody.

"Q Beside unlashing the stow, did your crew members also take the hatch boards off and beams off the number one hatch?

"A The hatch covers are being lifted by the winch, by the crew that was done -- excuse me. Not lifted, pulled up.

"Q How many days did it take to go from the loading port to the unloading port?

"A I have to check the logbook.

"Total from leaving Middlesbrough until arriving was 11 days and 18.3 hours.

"Q Was there any weather circumstances noted in the log for that period of time?

"A I only have the logbook pages of the date of the accident. But from the average travel or the time elapsed and 10.15 knots, I would deduce that the weather was not good all the time.

"Q It was not good?

"A It couldn't have been good all the time.

"Q Why, because you took too long to get to Newark?

"A Because otherwise the speed of the ship would have been higher.

"Q And you would have gotten to the Port Newark sooner?

"A Yes.

"Q How many days would it take for a normal trip without bad weather at sea to have come from this loading port to the unloading port?

"A I would have to divide 3,508 miles divided by

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13 knots.

"Q So what is your conclusion?

"A I would need a calculator.

"Q Well, you have experience in traversing the Atlantic from England to the United States?

"A Nine to ten days at sea.

"Q So this was three or four days more?

"A About three days more.

"Q And do you have any independent recollection whether that bad weather had anything to do with the movement or stowage?

"A Exactly nothing moved in the hold during the whole trip.

"Q But you do not have the log in front of you; do you?

"A I don't have it in front of me.

"Q Before you came to testify today, did you look at the log as regards the weather and any movement of cargo?

"A No.

"Q And since October 21, 1968 could you estimate for us how many voyages you performed as an officer of any company?

"A I couldn't tell you in terms of voyages. I am

gtbr "Ruhstein

sailing as an officer since 1960 or '61.

"Q I am talking about after 1968.

"A After?

"Q Until now, how many voyages were you on?

"A I was at sea all the time except two years, that I was on land."

Page 49, line 13:

"Q Now, the beam that fell, the 27-foot beam, was it stowed on its higher side or its lower side?

"A I wouldn't know which is the bigger one.

"Q Perhaps you could give us the dimensions of the beam then in height, length and width.

"A Yes, 27 foot,he said.

"Q You indicate it was stowed as an I?

"A Yes.

"Q If it had been stowed as an H would it have been more stable?

"A No, for the simple reason that you put wood underneath and that surface, the resting surface, is solidly bigger and therefore would preempt the moving about more than the otherway or would avoid rather than preempt.

"Q But if it were put on the H instead of the I, would the height have been less or the same?

"A I don't know that.

"Q Well, what are the dimensions of the beam?

"A 14 times 16 inches. But I don't know which side is 14 inches and which side is 16 inches.

"Q But it was higher than the adjoining 60-foot beams?

"A Yes.

"Q Now the 27-foot length of the beams involved in falling on the plaintiff, when put up against the 60-foot length of the other beams that were being discharged, what would make up the difference in the side space?

"A If there is different space, you stow another beam in it. But if none of this is available, then the space remains empty.

"Q So there were parts of the stow that had empty spaces in it; isn't that true?

"A That is correct. It cannot be avoided in such a type of cargo."

Page 52, line 17:

"Q And were the lashings when you inspected them tight or loose?

"MR. KLONSKY: Mr. Cichanowicz, this is your witness. I think you are leading him and I object to that.

"A The lashings at the beginning of the voyage, during the first and second days, became a little looser due to the vibration of the ship and the loosening up of the cargo, and after that, if they are tightened, they remain tight for the rest of the voyage."

Page 55, line 10:

"Q May I ask you this, sir, did you at any place during this voyage from England to the United States, put down in any paper what you observed when you made these inspections at sea?

"A No. I made no entries about it."

Page 58, line 9:

"Q Now, I show you 17 snapshots of the CHRISTIAN OLDENDORFF, a sister ship, and I ask you whether they represent substantially the same profile and appurtenances as you had on your vessel?"

Mr. Cichanowicz said "I object to that."

MR.CICHANOWICZ: I don't see any reason for reading the objection if I don't raise it at this point.

THE COURT: I agree, Mr. Cichanowitz. Just give the answer.

BY MR.KLONSKY:

"A Yes.

"Q But the point is that it represents the same

BY MR. CICHANOWICZ:

"Q Did you have somebody else on board the ship tighten the lashings?

"A The crew is doing that.

"Q And did you, after they tightened the lashings, did you make an inspection?

"A The inspection afterwards was done by the first officer."

MR. KLONSKY: I move to strike the testimony, because it does not show that he himself did it.

THE COURT: Motion denied.

BY MR. CICHANOWICZ:

"Q Now, on the occasions that you made the inspections, how did you find the stow?

"A I can only say that they were normal.

"Q Were the chockings in place?

"A They were in their place.

"Q Was the dunnage in place?

"A Yes.

"Q And were the lashings when you inspected them tight or loose?

"A The lashings at the beginning of the voyage, during the first and second days, become a little looser due to the vibration of the ship and the loosening up

of the cargo, and after that, if they are tightened, they remain tight for the rest of the voyage.

"Q Did you find them tight for the rest of the voyage?

"A Yes."

MR. KLONSKY: I objected to that, your Honor, on the ground that he still was not the one to check that. He did not say he did.

THE COURT: Overruled.

MR. CICHANOWICZ: Line 10.

"Q Now, the hold number one, I think you testified that you had cargo to be discharged at Newark and also at one other port: is that correct?

"A Yes.

"Q And what other port did you have cargo for in number one?

"A For New Haven.

"Q And where was that cargo stowed in number one?

"A Below the Newark cargo.

"Q Is it your testimony that the ship's winches and booms were not used to discharge cargo at the Port Newark on this occasion: is that correct?

"A Yes. The ship's own equipment was not being used.

objecting to.

THE COURT: All right.

MR. CICHANOWICZ: Line 15.

"Q Did you receive any --"

THE COURT: Mr. Klonsky objects to that.

I will sustain the objection.

MR. CICHANOWICZ: Line 22:

"Q Anddo you have a record of what the weather conditions were on this date?

"A From the logbook as far as I can see, the weather was fair. It was north whirlwind 8 o'clock, three to four, blue sky, barometer 1,010.5 millibars, temperature 12 degrees centigrade."

THE COURT: Does that complete your reading?

MR. CICHANOWICZ: Yes, your Honor.

THE COURT: All right, Mr. Cohen.

MR. COHEN: Just one thing, your Honor.

On page 59, line 16, this was a question by Mr. Klonsky to the witness:

"Q I also show you 7 photographs with the words Hoffman Crane on some of the photos; is that the crane substantially that was used at the number one hatch on the day of the accident?

"A I can't remember that any more.

grounds stated by the Court.

THE COURT: Yes, I think so.

MR. KLONSKY: This is just a description of the equipment that they furnished.

THE COURT: All right. If you have a witness, I will take the same testimony, but as I say, this is an admission and it isn't binding on the shipowner.

MR. KLONSKY: Does the shipowner object?

THE COURT: Does the shipowner object?

MR. CICHANOWICZ: As far as the cranes, these two I wouldn't object, identifying and describing the crane, but I object to the other one.

MR. KLONSKY: I haven't offered any others. I only offered this as a description of the crane.

MR. CICHANOWICZ: Those two.

Do you have an objection?

THE COURT: All right. The shipowner is not objecting. You can read it.

(In open court.)

MR. KLONSKY: Question 18. Describe in detail the equipment that was being used for the purposes of discharging cargo from the No. 1 hatch, giving the overall dimensions as to the length of the boom, the size of the body of the derrick, how it was made stationary to the dock.

Answer. Lima Truck Crane, having a lifting capacity of 65 tons. It was equipped with 80 feet of boom. The size of the crane is 11 feet two inches wide, 13 feet high and 31 feet six inches long, exclusive of its boom. It is mobile and, therefore, not secured to the dock.

Question 19. The number of controls on the derrick and set forthwhat specificmovement of the derrick was affected by each respective control, the number of cables on the derrick that controlled the movement of the derrick and how they affected the same, the number of employees on the derrick that controlled the movement of the boom and how they affected the same.

Answer. Said crane had the following hand controls:

Boom up and down, main load up-down, auxiliary load up-down, rotation of upper works; and the following foot controls:

Two brakes. There are two cable systems, one affecting boom movement and one affecting load movement. One man operates the crane.

Shall I proceed now?

THE COURT: All right.

What next?

MR. KLONSKY: I will call a witness, your Honor.

THE COURT: Who is the witness you are calling?

MR. KLONSKY: He is the signalman.

THE COURT: What is his name?

MR. KLONSKY: Mr. Gomez.

A L F R E D G O M E Z, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Gomez, what do you do for a living, sir?

A Longshoreman.

Q How long have you been a longshoreman?

A 24, 26 years.

Q And in what capacity have you worked as a longshoreman?

A In the hold, on the deck.

Q There are holdmen and deckman, is that right?

A Right.

Q And what part of the deckmen's jobs have you done in the past?

A Running the winches.

Q What else?

A Signalman.

Q On October 21, 1968, by whom were you employed?

A ITO.

Q Who are you employed by today?

A Sealand.

Q How long did you stay with ITO after this date of October 21, 1968?

A I think we went to Sealand around two and a half years ago.

Q How many years ago?

A Around two and a half years ago.

Q Before that you were with ITO?

A Yes.

THE COURT: The company you are working for today is different from ITO?

THE WITNESS: Yes.

THE COURT: It has no connection with ITO?

THE WITNESS: No. They specialize in containers mostly.

Q Mr. Gomez, please speak up so we can all hear you.

A Yes.

Q On October 21, 1968, what was your job in the morning?

A Signalman.

Q Tell us what a signalman does?

A Well, he looks down the hold and, it is like

gth 3 Gomez-direct

where he wants the boom to be placed, so he signals to the crane, because the crane can't see in the hold.

Q You mean the operator of the crane cannot see in the hold?

A No.

Q But you can?

A Right.

Q That is when you are around the coaming of the hatch itself and looking down?

A Yes.

Q When you give a signal to the crane operator, do you do it by the position at the coaming of the hatch or do you go to the rail?

A By the coaming of the hatch.

Q Which way are you facing when you give a signal?

A Facing the hatch.

Q And you give a signal with your hands, is that right?

A Yes.

Q When you want the cable to be taken in, what kind of signal do you do?

A This way (indicating).

Q You are indicating with your right hand coming toward you?

gth 4 Gomez-direct

A Yes.

Q When you want the boom itself to be moved, what kind of signal do you give?

A If I want it to go that way I go this way (indicating).

Q With one finger?

A Yeah. If I want it come this way I use the thumb like this (indicating).

Q All these times you are facing the hatch itself and looking down?

A Yes.

Q Do you remember the Jobst Oldendorf on that date?

A Yes.

Q What kind of a ship was it?

A Steel ship, bulk ship.

Q Bulk ship?

A Small. Three hatches.

Q Three hatches?

Did it have its own booms and winches?

A Yes.

Q And were the winch cables located in a position close to the hatch opening itself?

A No.

A I show you some photographs, Mr. Gomez.

MR. KLONSKY: May I have a moment, your Honor?

THE COURT: Of course.

(Pause)

MR. KLONSKY: In the pre-trial order, page 3.

THE COURT: May I take a look at it?

MR. KLONSKY: Yes, your Honor.

(Handing)

THE COURT: I don't think that would do it, Mr. Klonsky.

MR. KLONSKY: Then I will withdraw the question.

THE COURT: All right.

Q Mr. Gomez, did you see an accident occur to a fellow worker by the name of Benito Lopez?

A Yes.

Q Do you recall whether this was the 1st, 2nd, 3rd or 4th draft?

A 1st.

Q And were the steel beams the cargo to be discharged? Were there steel beams to be discharged?

A Yes.

Q And were they of varying lengths and dimensions?

A Yes.

Q Who opened the hatch?

A It was open.

Q Does your gang have lashers?

A No.

Q Are lashers an independent function to be performed by longshoremen?

A Yes.

Q When you looked down into the hold before the accident occurred, did you see anything with respect to the lashings on the beams to be discharged?

A There was no lashings.

Q They had been removed?

A Yes.

Q What about chocks, did you see any chocks down there?

A No.

Q They had been removed?

A Yes.

Q Dunnage, did you see any dunnage down there?

A No.

Q This was steel on steel, is that right?

A Yes.

Q Dunnage, is that something that the stevedore brings aboard or is it ship's equipment?

A It comes with the ship.

Q The ship owns its own dunnage, is that right?

qth 8 Gomez-direct

A I think so.

MR. CICHANOWITZ: Your Honor, I think at this stage I should object to counsel leading this witness.

MR. KLONSKY: This is basic information, your Honor.

MR. CICHANOWITZ: It is not.

THE COURT: I will sustain the objection as to form.

All right, let us go on.

Q The first draft, where was it made up?

A Forward of the ship offshore.

Q Offshore side? Do you recall which side was to the dock?

A Port.

Q So the offshore side was starboard?

A Right.

Q Do you remember which hold this was or hatch number?

A Hatch number 1.

Q In hatch number 1, was there a difference as far as you know of the configuration of the ship up by the bow as compared to the hatches after of this?

MR. CICHANOWITZ: I object, your Honor. This is leading.

THE COURT: I will permit it.

Do the best you can, Mr. Klonsky, to avoid

gth 9 Gomez-direct

leading questions, but we have to go on.

MR. KLONSKY: Yes, I will.

Q Was there a difference in the configuration of this hatch number 1?

A Yes. In the front it is narrow and the back it is wider.

THE COURT: Is hatch number 1 at hold number 1? Are the holds numbered different?

THE WITNESS: Yes, 1, 2, 3.

THE COURT: There are three holds?

THE WITNESS: Yes.

THE COURT: Is it hold 1, hold 2, hold 3?

THE WITNESS: Yes.

THE COURT: What hold is hatch number 1 on?

THE WITNESS: The first hold.

THE COURT: Hold 1?

THE WITNESS: Yes.

Q That is the one most forward of all the hatches, is that right?

A Correct.

Q Were there any wings in this hatch number 1.

A Well, as you went down it tapered.

Q It apered in the front, is that right?

A No -- yes, mostly in the front.

gth 10 Gomez-direct

Q Did that have any effect upon the construction of the wings?

A What do you mean by that?

Q Did that have any effect upon the presence of a wing in the forward part of the hatch? Was there one?

A In the forward? No.

Q Was there a wing on the starboard side?

A In the front?

Q Yes.

A No.

Q Was there a wing on the port side?

A Front or back?

Q Front.

A No.

Q Was there a wing aft?

A Yes.

Q And what else was there in the wing aft that was part of the construction of the ship?

A There was a partition in between.

MR. COHEN: Judge, I hate to interrupt. Perhaps Mr. Klonsky can explain to the witness what he means by a wing.

Q All right. Would you define a wing for us with respect to what you see when you look up in the sky while

gth 13 Gomez-direct

THE COURT: So the hold is made up of a square and wings?

THE WITNESS: Right.

MR. KLONSKY: But this particular hold only had one wing, your Honor.

THE COURT: All right, one wing.

Q And this was cut in half, was it, by the partitiion?

A Yes.

Q There is an inshore side to the partition and an offshore side to the partition?

A Right.

Q When Mr. Lopez was injured, were you observing what happened?

A Well, I was watching the draft.

Q Did you also watch the men down below?

A Yes. I seen they was all out of the way.

Q Where did they go?

A Inshore aft.

Q Inshore aft.

Would that be on the port side of the partition?

A Port is left?

Q Yes.

A Yes.

gth 14 Gomez-direct

Q And is that where Mr. Lopez was at the time of the accident?

A Yes.

Q Was he under the wing?

A Yes.

Q Did all the longshoremen who were working in the hold at that time go to that same area for sanctuary?

A I think so.

Q That is your best recollection, is that right?

A Well, at least three of them, three out of the four was there.

Q Tell us in your own words what you observed as to how this accident happened?

A Well, I gave the signal to the crane to pick up the load after it was hooked up.

He took a strain and then he couldn't pick any more -- to my estimation he couldn't pick no more, so he topped the boom up. Then he picked and as he picked it was scraping along the other beams.

Q What was scraping along the other beams?

A The draft.

And then the last beam toppled over.

Q Was it touched by this draft?

A Yes.

gth 15 Gomez-direct

Q You saw it?

A Yes.

Q The beam that topppled over was about how long?

A I couldn't tell how long it was.

Q How long were the beams that were in the draft being discharged?

A I don't know that, either.

Q You don't recall that?

A No.

Q Do you know how many beams--

THE COURT: Mr. Gomez, what is a draft?

THE WITNESS: It compiles of how many you are going to pick up.

THE COURT: Do I understand,I gather this is what it is.

It is the load which is being lifted to be taken ashore by the crane?

THE WITNESS: Right.

THE COURT: And in your business you call that a draft?

THE WITNESS: Yes.

THE COURT: The load being taken up?

THE WITNESS: Draft, load.

THE COURT: All right.

gth 16 Gomez-direct

Q Mr. Gomez, this draft was made up of about how many beams?

A I don't know.

Q Was this draft being discharged flush up or at an angle?

A At an angle when he topped the boom.

Q Why is it at an angle?

A Well, sometimes you can't bring it out of the hatch.

Q In this case do you know the length of the hatch as compared to the length of the beams?

A No.

Q Assuming that the beasm are longer than the opening of the hatch, would that be when you would angle it out?

A Yes.

Q And when you angle it out and you're taking in, where is the lower part of this particular draft?

A No particular -- it depends where they are.

Q This draft itself, when they were taking it out on an angle, was the draft raised or was it scraping along on the deck?

A Scraping.

Q And did you see the stow that it struck before the

gth 17 Gomez-direct

accident happened?

A What do you mean by that?

Q You say a beam toppled over?

A Yes.

Q Where was that beam located?

A Inshore, forward -- aft. Inshore aft.

Q Was it on the port side or the starboard side of the divider?

A The port.

Q And the beam, did it extend beyond the wing itself?

A Yes.

Q And the plaintiff, you say, was on the inshore side aft? Was he between the beams and the skin of the ship?

A I don't know. They was in that vicinity. They was inshore.

Q When you gave your signal to the crane operator, did you see all the men safely on the inshore side as far as you know?

A Yes.

Q This beam that toppled off, did it come from a pile that was there located?

A Well, they was standing up in the middle of the

gth 18 Gomez-direct

square

Q Was there any lashing on that beam?

A No.

Q Was there any chocking on that beam or the piles there?

A No.

Q And one of these unlashed, unchocked beams toppled over on the plaintiff, right?

A Yes.

Q And caught his leg, did it? Is that true?

THE COURT: You have got to say yes or no, because we have to record it and the jury has to hear you.

THE WITNESS: Yes.

A Yes. I heard them -- I heard them hollering over there. I just seen the front of the beam topple over and I heard him hollering there. Then I knew -- I seen Benny was under it.

Q I see.

At the time this beam toppled over, was he already in the offshore wing?

A Yes.

MR. KLONSKY: Your witness.

THE WITNESS: No, he was inshore.

Q Inshore wing. I'm sorry.

A Inshore.

CROSS EXAMINATION

BY MR. CICHANOWITCZ:

Q Mr. Gomez, you have been working on the waterfront now for how many years?

A Since 1949.

Q And during those years you have worked discharging and loading ships?

A Yes.

Q And you have worked on air carriers, haven't you?

A Yes.

Q You have worked on general cargo ships?

A Yes.

Q Of various types, is that correct?

A Correct.

Q And on all of those ships, do they use signalmen?

A If you can see in the hold, no.

Q But do you always have a signalman as one of the deckmen who is employed on board a ship?

A Well, if the ship is low and even with the dock and the two men running the winches can see in the hold and you can see on the dock, then we only use two men.

Q Right.

A If you can't see on the dock, we need a third man.

gth 20 Gomez-cross

Q But there is always as part of the gang working a hatch, there is always one person who can act as a signalman, right?

A No. We have our steady four men.

Q You have your steady four men?

A If a man doesn't show up, yes.

Q Then you rotate, is that correct?

A No.

Q Don't the four men that you have rotate as signalmen, some work as winchmen --

A Yes.

Q Out of the four men, two men work the winches, is that right?

A Sometimes one and one.

Q One or two men work the winches?

A I can't say.

Q One man works as the signalman and the other man is on relief, is that correct?

A Correct.

Q And then you rotate every, what, two hours or three hours?

A If it is warm we do it two, if it is cold we do it one.

Q But that is the standard number of men that

gth 21 Gomez-cross

you have when you are working a ship? You have four deckmen to do those things, is that correct?

A Yes, unless it is something you use more.

Q Sometimes you use more, is that correct?

A Yes.

Q And the job of the signalman is to stand on the deck, look down into the hatch and give signals to the winchmen?

A Right.

Q And that is whether the winch is operated aboard a ship or whether you use a mobile crane, is that correct?

A Correct.

Q And you have done that many, many times over the years, isn't that so?

A Yes.

Q And working as a signalman, you position yourself, where, in such a position that you are visible to the winch operator, is that correct?

A Correct.

Q And if you are using a mobile crane, you put yourself in a position where you are visible to the crane operator, is that correct?

A Correct.

Q On this ship, on the Jobst Olendorf, where

gth 25 Gomez-cross

A Maybe I was talking with the fellows down the hold. I don't know. I don't remember.

Q And you say you were talking to the fellows down in the hatch or in the hold?

A Well, they didn't get down there yet.

Q I beg your pardon?

A They didn't get down there yet.

Q Did you look down into the hatch?

A Yes.

Q Before they got down there?

A Well, probably by the time they got down I got up the stairs.

Q And did you take a look at the whole hatch?

A Yes, except inshore.

Q Except what was underneath the deck you were standing on, right?

A Yes. It ain't that much.

Q And you were able to see what was across from you on the offshore side, right?

A Yes.

Q Were you able to see what was aft in the hatch?

A Yes.

Q And were you able to see what was forward in the hatch?

A Forward?

Q Yes.

A There was a bulkhead.

Q Yes. But you were able to see what was under the wing forward, right?

A Yes, yes, I seen.

Q Were you able to see all of this steel cargo that was stowed in number 1 hatch before you started to work?

A Did I see it all?

Q Yes, other than what was underneath.

A From the view that I took and it was taking that draft out where I could see it, I didn't have to move around.

Q I know what I am saying, before you started removing that hatch, did you have an opportunity to observe and see what the condition of the hatch was?

A What do you mean by the condition of the hatch?

Q Could you see what the conditions in the hatch were; what was stowed there, how it was stowed, where it was stowed?

A They had one draft offshore and then it was level after that draft.

Q Everything was level then?

A Offshore.

Q Yes.

A And inshore they had maybe these -- I don't know what it is, eight, ten pieces, of them I beams on this side of the stanchion.

Q When you say "this side," was it inshore?

A Inshore.

MR. KLONSKY: Do you mean a divider when you say stanchion?

THE WITNESS: Yes.

Q There were no stanchions in the hatch, were there?

A I mean the partition.

And those eight or ten beams was there, I don't remember how many, and then there was another drop, like. There was no steel there.

Q In the square of the hatch, was the stow level?

A Yes.

Q And you say only on the sides there were some steel beams that were stowed higher than the level of the hatch square, is that correct?

A Yes.

Q By the way, in order to remove cargo from a hatch that has been lashed, you have to remove the lashings, right?

A Yes, but there was not any.

gth 28 Gomez-cross

Q Yes.

You don't know whether somebody removed the lashings or not, is that correct?

A That's the way it was when I got there.

Q But you have worked on other ships that have been lashed?

A Yes.

Q When you come on board, the lashings have already been removed, isn't that right?

A Sometimes yes, sometimes no.

Q Well, most of the time are they removed by the ship's crew?

A Yes.

THE COURT: And until the lashing is removed, you can't unload the cargo, can you?

THE WITNESS: Correct.

MR. KLONSKY: May I rise to object, your Honor, because we have to refer to what cargo and what is in the way of cargo being discharged to determine whether lashings should be removed.

I think the question is too general.

Would you remove the lashings from cargo that is in the way of the draft? That is the way the question should be worded.

gth 29 Gomez-cross

THE COURT: The only point is it just seems to me perfectly obvious that you can't pull out of a hold cargo which is lashed down, that's all I am saying.

MR. KLONSKY: But there was cargo that was not being removed at the time and the question is should that have been lashed.

THE COURT: I didn't ask about that, I only asked about cargo being removed.

MR. KLONSKY: I see. I'm sorry.

THE COURT: You can't remove cargo, can you, Mr. Gomez, if it is lashed down?

THE WITNESS: No.

THE COURT: That is all.

MR. KLONSKY: I withdraw my objection, your Honor.

THE COURT: That is all right.

Q This draft that was being removed when the accident happened, where was that made up?

A Forward offshore.

Q Forward offshore.

And who made that draft up, could you tell us that?

A What do you mean by making up a draft? All you do is put slings around it.

Q Right. Would you call putting slings around

gth 30 Gomez-cross

it making up a draft?

A Yes. Four men down the hold.

Q Pardon?

A The four men down the hold.

Q And what kind of a sling was put around this draft?

A Chain.

Q Chain slings?

A Chain slings.

Q And after the chain slings were put around the draft, then what was done with the chain slings?

A Hooked up to the Hoffman crane, the hook.

Q To a hook?

A Yes.

Q And this hook was what, on a wire cable that ran to the boom of the crane?

A Yes.

Q After the chains were hooked up to the hook of the wire cable, what was done?

A I gave him the signal to pick it up (indicating).

Q Let me ask you this:

Before the chains were hooked onto the cable, had you give any signals to the crane operator?

A No. Oh, to get him over there, yes.

gth 31 Gomez-cross

Q In other words, you had directed h-m to get his--

A To put the ball right over there.

Q To get his hook down to where the draft was, is that correct?

A Yes, to the middle of the draft, because if you put it in the front the chain in the back can't catch.

Q So he was directed to swing his hook over to where this draft was being made up?

A Correct.

Q And then after the chains were hooked onto the hook, then you ga ve a signal, is that correct?

A After the men started to walk away.

Q When you gave your signal, had the men walked away or were they just starting to walk away?

A They was walking away.

Q How far were they from the draft when you gave the signal?

A I don't know. Maybe four foot around from where they was going.

MR. KLONSKY: Say that again?

MR. COHEN: I didn't hear the answer.

THE COURT: Mr. Reporter.

THE WITNESS: They was under the wing already. They was nearly under the wing.

THE COURT: Wait, Mr. Gomez.

Would you read the answer.

(Record read)

THE COURT: Now go ahead. You wanted to add something?

MR. KLONSKY: He did add something, your Honor. I think the reporter has it.

THE COURT: All right.

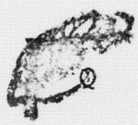
MR. KLONSKY: Could you read it to us, sir.

(Record read)

THE COURT: Have you finished your answer?

THE WITNESS: Yes, because by the time he starts booming up, it takes more time. They was under the wing.

MR. KLONSKY: They were under the wing?



Q Then after you gave your signal, I understand then was the draft raised.

A Not right away, no.

Q But did there come a time when it was picked up?

A Yes, later.

Q And after it was picked up, what do you say, it scraped along the beams that were stowed in the hatch?

A Yes.

Q And where were these beams that were stowed in the hatch? Were they in the square of the hatch?

gth 33 Gomez-cross

A Yes.

Q And you say they scraped along until it finally knocked one of those beams over?

A The last one, yes.

Q And that was the last one in this level pile, is that correct?

A Correct.

Q And that's the one that fell over?

A Right.

Q Thank you.

THE COURT: Mr. Cohen?

MR. COHEN: Yes, your Honor.

CROSS EXAMINATION

BY MR. COHEN:

Q Mr. Gomez, may I show you these seven photographs which have been marked Exhibit A for identification, and ask you whether any of them show the kind of crane that was involved in this case (handing).

A You are asking which crane we used that day?

Q No. I am asking whether any of these photographs are similar in type to the kind of crane that was being used that day.

A I'd say yes.

Q Which of the photographs show a crane that

gth 38 Gomez-cross

Q The wheel?

A Yes.

Q Runs through --

A No. The wheel is attached to these--

Q That is what I wanted to get to.

A The wire runs through it.

Q We will get to the wire in a moment.

That wheel at the head of the boom rotates, does it not?

A Yes.

Q And part of the boom is furthest away, the part that in that sketch is in the upper part, that is called the head of the boom?

A Yes. Over here (indicating).

Q That boom can lower and raise itself, can it not?

A Yes, it depends what the operator wants.

Q The operator sits in a cab somewhere--

A Yes.

Q And he has levers there that allow him to either raise or lower the boom itself, is that correct?

A Correct.

Q And he also has levers that allow him to move that boom from side to side, does he not?

A Yes.

gth 39 Gomez-cross

Q Is there a cable that runs along that boom and over that head block or wheel and then runs down to which a hook is attached?

A Yes.

Q Would you be able to sketch in a cable that runs over that and down the wheel with a hook on it?

A (Witness complies)

Q Can you just draw a little hook at the end of the cable?

A You have the ball first and then the hook.

Q Okay, ball and hook.

That cable at its other end is attached to a drum or a winch of some sort on the crane, is it not?

A Yes.

Q Can you show us approximately where that would be located?

A I think some of them is -- some of them is in the back, some -- they are different.

Q But it is in the cab of the crane?

A Yes, in the back of it.

Q And the crane operator has controls inside the cab that allow him to raise and lower that hook while the boom remains stationary, is that right?

A Yes.

we can all agree on it.

THE COURT: I should think so.

We will certainly preserve it through this afternoon and tomorrow.

MR. COHEN: Thank you.

(Jury present)

CROSS EXAMINATION CONTINUED

BY MR. COHEN:

Q Mr. Gomez, when you arrived at this ship on the morning of October 21, 1968, was the Hoffman crane already there?

A I think we had to wait until they put it in place.

Q I'm sorry?

A I think we had to wait awhile until they put it in place.

Q You mean she came along a little bit after you?

A I don't know when it was there, but you got to put it in place where they spot it for the ship.

Q The ship was tied up at some pier?

A Yes.

Q When you arrived at the pier, was the Hoffman crane already there?

A I don't remember. It must be there, yes.

Q And then the first thing that had to be done was

to put the crane in place for the work that it was to do?

A Yes.

Q And what did that involve doing?

A Well -- they put it where they think they can work the best with it.

Q When you say "they" you mean the people on the Hoffman crane?

A The crane, yes.

Q It had some personnel with it?

A Yes.

Q And this crane is on wheels and has a motor, does it not, so it can drive up and down?

A Yes.

Q And they drove it alongside the hatch of the ship?

A Yes.

Q But the crane is on the land, on the pier?

A Yes.

Q After it was alongside the hatch of the ship, was it necessary to put the head of the boom in a particular location over the hatch?

A What do you mean, before they set up?

Q Before the work begins.

A I don't know.

Q Do you know the term spotting the boom?

A Yes.

Q What does that mean?

A Well, when we rig up I know what it means.

Q What does spotting the boom mean?

A When we rig up the ship or this?

Q The crane.

A He puts it in the middle of the hatch to see if he -- see if he can come down far enough.

Q What does that mean, see if he can come down far enough?

A That's spotting the boom.

Q When you say seeing if he can come down far enough, you mean seeing if the line will pay out to where the draft is?

A No, the head over to where the steel is.

Q All right.

The head of the boom has to be over where the draft is to be picked up?

A Yes.

Q Does it have to be in plumb?

A Yes.

Q Can you explain that to the jury, please, what that means and why it is necessary that it be in plumb?

A Plumb is a straight line from the top of the boom

to where the load is, because they can't get it over there-- if you don't put it in plumb, they can't hook it up because that ball is heavy, you can't drag it.

Q So that the ball and the cargo hook have to come down squarely over the draft that is to be picked up?

A Yes.

Q And that can only happen if the head of the boom is so maneuvered by the crane operator that it is over that spot, is that right?

A Yes.

Q The crane operator from where he is sitting in that crane cannot see to the bottom of the hatch or the hold where the steel was, could he?

A No.

Q So you were there serving as his eyes, so to speak, is that right?

A Right.

Q The first draft that was to be picked up was on the offshore side of the ship?

A Right.

Q And by offshore we mean the side of the ship that is closest to the water?

A No.

Q We don't?

A Well, to the water, I can't say.

Q And by inshore, the opposite side, we mean the side of the ship that is next to the pier?

A Right.

Q Since the first draft to be picked up was on the offshore side, where did you position yourself so that you would best be able to observe it?

A I told you before, like, I was right in front of him. He was behind me.

Q By "he" being behind you, you mean the Hoffman crane operator?

A The crane operator.

Q You are standing on the deck, you are not in the hold?

A No, I am standing on the deck. I am a little higher on the deck there.

Q The deck you are standing on, are you standing on the inshore side or the offshore?

A Inshore.

Q So when you are standing on the inshore side, you have an unobstructed view diagonally down into the lower hold and you can see the offshoreside?

A Right.

Q What you cannot see too well is the inshore side

gth 49 Gomez-cross

because you are standing on the deck that covers that, right?

A Right.

Q So you positioned yourself where you could see the draft that was to be picked up?

A Yes.

Q And you put yourself in a position there so that you were right in front of the Hoffman crane operator?

A Right.

Q So that he could observe your signals?

A Right.

Q Are there different signals generally used to top a boom in contrast to raising up a draft?

A Yes.

Q The first thing I would like you to explain to the jury is what the term "topping the boom" means?

A It means that he was over the draft. The draft was over here. Now, when he tops the boom, he goes this way (indicating).

Q In other words, that is a physical movement of the boom itself?

A Yes.

Q So that on this diagram on the blackboard which we will make a copy of and mark, when the boom is topped, it means that it is physically, the metal object, is physically

gth 50 Gomez-cross

moved back in that direction?

A Right.

Q Closer to an upright position, is that correct?

A Right.

Q And that is what you mean by topping the boom.

And lowering the boom would be the reverse?

A Yes.

Q I would mean moving that metal boom so that it is down further away from the crane, is that right?

A Yes.

Q What is the signal which is given for a topping or a lowering of the boom itself?

A When I want to lower the boom? I go like this (indicating).

Q You are indicating your arm out with your thumb pointed down?

A Right.

Q And if you want to signal for a topping of the boom, what is the signal you would give?

A (Indicating)

Q You are indicating with your arm extended and your thumb up?

A I can't say.

Q Is there a different signal given for lowering

and raising the cargo hook?

A Yes.

Q And what could you show us, please, is the signal for raising the cargo hook?

A Waving the hand with the palm upward.

Q You are indicating your hand is outstretched and your palm upward and you are giving a come here effect with the fingers?

A Yes.

Q What is the signal given for lowering the cargo hook?

A (indicating).

Q And you are indicating--

A Palm down.

Q -- that the palm is down and you are making that wagging motion with your fingers?

A Yes.

Q When the cargo hook is raised or lowered pursuant to one of those signals that you are giving, the boom is supposed to remain stationary, is that right, unless you have signaled for it to move?

A Unless I am telling him to top it.

Q Absent -- not absent. Withdraw that.

If you don't give any signal for topping the

boom or lowering the boom, do you expect the boom to remain in position while the cargo hook is being raised or lowered pursuant to a signal of yours?

A Yes.

Q After the head of that boom was spotted in position so that it was plumb over that first draft to be discharged from the hatch, what did the longshoremen working down in the hold do?

A After they hooked it up?

Q Okay. Could you explain, first, how many men were down there working in the hold in addition to Mr. Lopez?

A Three others. Four all together.

Q Did they split up so that two of them were working on one end of the beasm in this draft and two others were working on the other end of the beams on the draft?

A Yes.

Q And can you explain to us, please, what they did to hook up?

A They slid the chain underneath.

Q Each group of two men would slide a chain underneath their respective ends?

A Grab one side, the other guy grabs the other side, they get it underneath.

Q Dealing with one end of the beams, one man would

gth 53 Gomez-cross

grab ahold of a chain, the other man would grab the other side of the chain and put it underneath that end of the beam?

A Yes.

Q And then at the opposite end of the beam two other men were doing essentially the same thing with another chain, is that right?

A Right.

Q And then these two chains -- withdrawn.

Each one of these chains would be passed through itself, through an eye of some sort?

A Yes.

Q So it can be tightened up, is that correct?

A Yes.

Q And that would happen at each end?

A Yes.

Q Then both ends of those chains would be attached to the cargo hook, would they?

A Right.

Q So that when the hook was then told to be brought up, you would have one chain extending out here, another chain extending diagonally in that direction, both of which bind opposite ends of the beam and because of the weight of the beam the chains would draw tight?

gth 54 Gomez-cross

A Correct.

Q And is that the way the operation essentially works?

A Yes, mostly.

Q With this particular first draft, did you see the men put the chains underneath both ends of the beams in the draft?

A Did I see them? No.

Q You weren't watching that?

A No.

Q Did you see after the chains were around the beams in the draft and put onto the cargo hook?

A Yes.

Q Up to that point, the crane had not been used in any way to move the beams, had it?

A No.

Q How were the men able to get the chains underneath the ends of these beams?

A There was a piece of dunnage underneath.

Q So there was dunnage underneath the beams?

A Only on that draft.

Q We are talking about that draft.

There was wood underneath those beams, is that right?

A Right.

Q And because there was wood underneath those beams that separated those beams from the beams underneath it, the men were just able to slide the chain underneath the ends, is that correct?

A Correct.

THE COURT: Tell me, when this draft was made up, the beams were lying in the square of the hatch?

THE WITNESS: It was up against the -- what do you call it?

THE COURT: Were they underneath the open hatch?

THE WITNESS: Yes.

Well, a little under. Not that much.

THE COURT: What I am trying to understand is, if these heavy beams are not under the open hatch when the ship arrived, how do they move such heavy cargo to the open area of the hatch so that it can be picked up?

THE WITNESS: Well, if you have deep wings-- but this was -- you can say practically none.

If they have deep wings, they put one chain on it and then you drag it out on one chain.

THE COURT: You drag it until it gets under the open hatch?

THE WITNESS: Yes.

gth 57 Gomez-cross

A Right.

Q And what is generally referred to as a wing area is that portion in the hold which is not immediately below the hatch opening but may be on one side or the other side of it covered over by the deck above?

A Yes.

Q That is the wing area?

A Yes.

Q In this ship in the number 1 hatch in the area where this draft was being made, is it your testimony -- you tell us yes or no -- that because of the curvature of the ship from the bow there was no wing area in this particular place?

A Practically none.

Q After the men working in the hold hooked the chains onto the cargo hook, it was then your turn to do something next, is that right?

A Yes.

Q And that was to give whatever signals had to be given to the crane operator?

A Yes.

Q What I would like you to do with me, if you would, is to my knowledge that this jury rail represents the waters edge and that these folks sitting in the jury box

gth 58 Gomez-cross

are on the pier so that this is the pier. Okay?

I would like you to imagine that the front of the ship faced up toward the area where his Honor sits so that the port side of the ship would be next to the pier as in this case. Right?

Can you get yourself oriented?

A That is the pier?

Q Yes. The jury box is the pier.

A That is the pier, this is the ship?

Q This is the pier. The ship is in the waer over here. The bow of the ship is up toward his Honor, so the port side of the ship is next to the pier. Right?

Are you with me? I want you to get yourself oriented so you can understand it.

A Why don't you do it the way like he was behind me. You are putting everything on the opposite way.

Q No. He will be behind you. He will be on the left hand.

The ship was port side to the pier, wasn't it?

A Yes.

Q And that would mean that if this is the pier, the front of the ship would be up toward where his Honor is sitting?

A Why don't you do it my way? Put the crane behind

gth 59 Gomez-cross

me.

Q It will be.

A No, it won't be if I am sitting here.

Q You don't have to sit in the witness chair if you will just orient yourself with me for a moment. Okay?

Try to follow me.

A I will do it there.

MR. COHEN: May he, your Honor?

THE COURT: Yes.

Q Okay.

Now, this is the pier over here. The crane is on that pier.

A Right.

Q The bow of the ship is up where the judge is sitting.

A Yes.

Q So this is the port side of the ship next to the pier and that is the inshore side.

A Yes.

Q The starboard or the offshore side is some distance over that way (indicating).

A Yes.

THE COURT: Speak up, Mr. Gomez, so that the reporter can hear you, because we have to record this.

9th 60 Gomez-cross

Q You are on a deck above looking down diagonally across into the offshore side of the lower hold?

A Yes.

Q The crane operator is now behind you?

A Yes.

Q All right.

What kind of a signal did you give the crane operator when you saw that the men in the hold had put the chains onto the cargo hook?

A (Indicating)

MR. COHEN: Indicating, if I may describe it for the record, your Honor, his right hand is outstretched with his palm up waving his finger in a come hither.

THE COURT: Meaning leave the boom of the crane in place and raise the cable?

THE WITNESS: Yes.

THE COURT: With the cable hook?

THE WITNESS: Yes.

THE COURT: Right?

THE WITNESS: Yes.

Q And is that the only signal you gave him?

A Yes.

Q You gave him no signal to move the boom of his crane?

A No.

Q Did he notwithstanding your signal move the boom of his crane?

A What do you mean by that?

Q Did he move the boom of his crane?

A I can't say. He topped it.

Q He topped it?

A Yes.

Q So that he moved the boom further up toward the horizontal?

A I can't say, topped.

Q When the boom, which was behind you -- the base of the boom -- is that correct? The base of the boom was behind you?

A What do you mean, after he topped it all the way up?

Q No, no, no.

A Yes, yes.

Q The crane is behind you?

A Yes.

Q And when the angle of the boom is brought further up to the horizontal, does that have the effect of causing the draft suspended on that hook moving from the offshore side over to the inshore side?

A Yes.

MR. KLONSKY: You mean higher up in the vertical?

THE COURT: Yes.

You said toward the horizontal. You mean the vertical.

MR. COHEN: Whereever I said --

MR. KLONSKY: May we have that question read again?

MR. COHEN: I think I made that mistake several times.

THE COURT: No, I think once.

Wait, wait, let's have it read back.

Mr. Reporter, would you read back beginning with Mr. Cohen's question in which he used the word "horizontal."

(Record read)

THE COURT: I think we all agree that you meant to say vertical instead of horizontal.

MR. COHEN: Yes. And I was indicating vertical with my pen.

THE COURT: I think we all understand.

Q I want to make sure you undersrand.

A Yes. As he tops it.

Q As he tops it, which is getting the boom further to the vertical, does that have the effect of causing whatever

gth 63 Gomez-cross

is on the cargo hook of moving from that offshore side over to the inshore side?

A Yes.

Q And is that what caused the draft of beams in this case to move from the offshore side where it had been hooked up over to the inshore side where it struck the other beam?

A Yes.

Q I think you can rush to the witness chair now.

THE COURT: And I take it that when the crane operator topped the boom as you just described it, that was without any signal by you to do so?

THE WITNESS: Yes.

THE COURT: Is that right?

THE WITNESS: Yes.

Q Were you in a position to actually yourself see the injury to Mr. Lopez?

A The injury?

Q Yes.

A No.

Q So you didn't actually see him get hurt at the moment he got hurt?

A No. They hollered.

Q Because he got hurt on the inshore side, which

would be underneath the deck on which you were standing?

A I could see them, though.

Q You could see them?

A Yes.

Q And what could you see?

A I seen Benny on the floor with the beam on his leg and them hollering at me.

Q Let me make it clear to you.

At the time that Mr. Lopez or Benny, as you call him, got hurt, was he in the open square of the hatch or was he underneath some covered over deck area on the inshore side?

A Underneath.

Q If he was underneath that inshore deck area, how could you, from where you were standing up above on the deck on the inshore side, see him?

A He was not all the way inshore, he was midship inshore.

Q What does that mean, midship inshore?

A Midship is the center of the ship.

Q That is the line --

A Inshore is you got to go all the way to the side if you are saying inshore is all the way in.

You draw a line in the middle of the hatch and one is offshore and one is inshore, but you can still see

gth 65 Gomez-cross

inshore.

Q Is it correct or fair to say, then, that Mr. Lopez was, at the time of the accident, in some place that was still in the open square of the hatch?

A No, he was not in the open square.

Q He was not?

Was he underneath some part of the wing on the inshore side?

A Yes, aft.

Q The after wing?

A Yes.

Q And where were you standing, on the forward or after end?

A Forward.

Q I see. So is it your testimony that from where you were standing forward on the inshore side, you could see slightly underneath that after inshore wing?

A Yes.

Q I see. Okay.

MR. KLONSKY: I don't think the word "slightly" has any place in that question.

MR. COHEN: I will take it out and ask the question over again.

Q From where you were standing on the forward inshore

side, were you able to see underneath the after inshore wing?

A Yes.

The after part, yes. Not all of the inshore wing, no.

Q Just the after part?

A Past the stanchion where they were standing, the partition.

That is nearly the middle of the ship. That was only five, six, seven beams. I don't know.

Q That was the after part where that hatch widens out, is that correct?

A Yes.

Q I think I understand it.

Let me ask you once again.

Did you actually witness Mr. Lopez at the moment he got hurt?

A See the beam go on him?

Q Yes.

A No.

THE COURT: Tell me, when the crane operator topped the boom, as you said, and caused the cable to move closer inshore, did he also raise the cable hook?

A Yes.

THE COURT: He did both operations?

THE WITNESS: You could do two, both at the same time.

THE COURT: I know.

And, in fact, he did both at this time?

THE WITNESS: Yes.

THE COURT: So he was raising the boom toward the vertical and also raising the cable hook with the draft on it?

THE WITNESS: Yes. But usually they do one at a time, I think. I'm only guessing.

THE COURT: But in this instance, whether at the same time or one at a time, he did both?

THE WITNESS: Yes.

THE COURT: Am I correct?

THE WITNESS: Yes.

THE COURT: All right.

Q How far away from where that draft was picked up on the offshore side was the place where you later saw Mr. Lopez hurt? How many feet?

A I don't know how many feet.

Q Can you approximate it for us?

A It is only a guess.

Q You were there. Can you give us your best approximation?

A From where the draft landed inshore?

Q Let me get it.

The draft was picked up at some point on the offshore side?

A Yes.

Q Did you see that draft drag across the evenly stowed cargo as you testified to Mr. Cichanowicz?

A Yes, yes.

Q And how far across that evenly stowed cargo did you see the draft move inshore?

A What do you mean how far across? It kept coming in inshore. What do you mean how far inshore?

Q How big was the movement? How many feet, approximately?

Was it as wide as this courtroom, more or less? You know, as best you can remember it.

A I can't say, around as wide as this courtroom.

MR. KLONSKY: What can we say this is? About 35 feet?

MR. COHEN: Some courtrooms, your Honor, we have the measurements.

THE COURT: I don't know whether we have here or not.

Do we, Mr. Clerk?

THE CLERK: It is usually in the drawer and it isn't here.

THE COURT: We don't have it.

MR. COHEN: These are nine-inch tiles.

THE CLERK: It is 52 by 25.

MR. KLONSKY: So this would be 25 feet.

THE COURT: It is 25 feet from wall to wall.

A I'm only guessing.

Q I don't want you to guess, but I want you to give us --

A You said approximately.

Q That's right. Okay.

You saw Mr. Lopez lying at some point on the inshore side, is that correct?

A Yes.

Q Can you tell me approximately how far it was that you saw him lying from the place where that draft had been picked up on the offshore side?

A How far?

Q Yes. Approximately.

A I didn't bring my ruler with me.

From where they hooked up the draft? I'd say 30, 35 feet.

Q Did you see a beam next to Mr. Lopez?

A Yes.

Q And was the draft anywhere in the area of Mr. Lopez?

A No.

Q Where was the draft?

A It was forward, the draft.

Q As that draft came moving across inshore scraping over the evenly stowed cargo, did you give any further signal to the crane operator to stop or let go or do something?

A No.

Q How long did it take, approximately, for that entire incident to occur, the draft to swing across that way?

A 15 seconds. I don't know.

MR. KLONSKY: How many seconds did you say?

THE WITNESS: 15.

MR. KLONSKY: 15 seconds.

Q And who gave any signal, if anybody did, to the crane operator to stop the movement completely?

A I did.

Q When did you do that?

A When there was hollering after the beam fell.

MR. COHEN: I have no further questions.

gth 71 Gomez-cross

THE COURT: All right, Mr. Blanc.

CROSS EXAMINATION

BY MR. BLANC:

Q What happened after you gave the first signal to the crane operator to raise the draft?

A He took the strain out of the chains.

Q Will you tell the court and jury what that means?

A He went up.

Q And when he went up, what happened to the chains and the cable? Did they get tight?

A Right.

Q And after he did that, what happened next?

A He started to top the boom.

Q Where were you standing when he started to top the boom?

A In front of him.

Q Did you give him any signal to top the boom?

A No.

Q Did you give him any signal to stop, not top the boom?

A No.

Q Where were you looking at the time he topped the boom?

A At the draft.

gth 72 Gomez-cross

Q And the draft came up first off the other cargo?

A No.

Q What did it do after he topped?

A Started dragging inshore.

Q When it started dragging inshore that 25-foot distance, that beam was dragging across cargo, is that right?

A Right.

MR. KLONSKY: Beams, Mr. Blanc.

Q When the draft was dragging across the beams, did you then signal the crane operator to stop?

A No.

Q And you watched it for 15 seconds drag across the cargo, is that right?

A Approximately. I don't know how much time.

Q Whatever the approximate time was and during that entire time, you gave the crane operator no signal?

A No.

Q From where you were standing, could you see the four longshoremen as they moved toward the after inshore wing?

A Yes.

Q Where did they get to?

A What do you mean where did they get to?

gth 73 Gomez-cross

Q Before the crane started to drag the beam, the draft of beams, did they get back under the after wing on the inshore side?

A Yes.

Q All four of them?

A I don't know.

Q Do you remember giving a statement in this case on October 21, 1968, on board MS Jobs Olendorf at Port Newark, New Jersey?

A Yes.

Q Do you remember--

MR. KLONSKY: What is the date of that statement, Mr. Blanc?

MR. BLACN: October 21, 1968.

Q Is this a copy of the statement which you gave on the ship on that date (handing)?

A 60 foot?

Q The question is whether this is a copy of the statement which you gave on that date?

MR. KLONSKY: Might I suggest that you ask if that is his signature on the statement?

Q Is that your signature on the side of the statement, on the first page?

A Yes.

gth 74 Gomez-cross

Q Are those your initials on two places?

A Yes.

Q And does your signature also appear at the bottom of the second page?

A Yes.

Q And do your initials appear opposite the third line on the second page?

A Yes.

MR. BLANC: I offer that as Hoffman's Exhibit for identification.

(Defendant Hoffman Exhibit A was marked for identification.)

xx

MR. BLANC: I now offer it into evidence.

MR. KLONSKY: Do you have a copy to give them, too?

MR. BLANC: Yes.

(Pause)

THE COURT: Any objection?

MR. COHEN: I am reading Mr. Cichanowicz' copy, your Honor. It is a little difficult. May I have just another moment?

(Pause)

MR. KLONSKY: No objection, your Honor.

MR. COHEN: I have no objection.

THE COURT: All right. Without objection, it

will be received. Mark it.

(Defendant Hoffman Exhibit A was received in evidence.)

xx

Q Do you recall saying in the statement which you gave aboard the ship on the date of the accident "Chain slings with metal rings at both ends were being used."?

A Yes.

Q "The slings were placed under the draft."

A Yes.

Q "I gave signals to the crane operator to pick up."

Do you remember that?

A Yes.

Q "The crane operator kept picking up the crane's boom in order to pick it up."

A Yes.

Q And when you said "it" there, you meant in order to pick up the cargo, is that right?

A Yes.

Q "Then he was trying to pick it up and one end swung around across the deck on top of other steel beams."

Did you make that statement at that time?

A Yes. Well, one end comes toward the other end.

Which one I don't know.

Q "As this happened, it struck another beam which was stowed and knocked it over to one side."

A Yes.

Q Do you recall making that statement?

A Yes.

THE COURT: Of course, the deck you are talking about there is the deck in the hold, isn't it, not the deck on which you were standing?

THE WITNESS: No.

Q When the draft of steel beams struck the other beam, were the other men standing in one of the corners of the wing at the after inshore side of number 1 hold?

A Yes.

Q And was Lopez standing in a different place?

A No. He was under the wing.

Q Was he standing at some distance from the other men?

A I don't know.

Q Were the other men further into the corner of the after inshore wing?

A I don't know.

Q Do you remember stating --

A It just seemed as though they were all under there.

Q Do you remember stating on October 21, 1968, "If

gth 77 Gomez-cross

Lopez was away from the beam as some of the other men were in one of the corners, this would not have happened."

A You mean the last beam?

Q Do you remember making that statement?

A He was near the last beam, that's why the beam fell on him.

Q Do you remember making this statement:

"If Lopez was away from the beam as some of the other men were in one of the corners, this would not have happened."?

MR. KLONSKY: Your Honor, I rise to object in that it is not inconsistent with the testimony.

THE COURT: That does not make any difference. All he is asking him is does he remember making the statement.

Do you remember making that statement?

THE WITNESS: Yes. He was closer to the beam, that's why he got hurt.

THE COURT: He says he does remember making the statement.

MR. KLONSKY: It had to be.

Q And do you also remember making this statement:

"The beams were stored fore and aft and the stow was in good order."?

A Yes. I put everything down that I said.

gth 78 Gomez-redirect

MR. BLANC: That's all I have, your Honor.

THE COURT: Mr. Klonsky, anything else?

MR. KLONSKY: I just have a few questions, your Honor.

REDIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Gomez, what is the signal that you give to stop the movement of the crane?

A Stop the hand (indicating).

Q Did you at any time give that signal?

A No.

Q When you observed the draft being taken in by the crane, was this after the men had gone to the after part of the ship?

A Yes.

Q And as far as you knew at that time, were the men safetly located at that time?

MR. CICHANOWICZ: I object to that as leading, your Honor.

MR. BLANC: I object to the question.

MR. KLONSKY: As far as he knew, your Honor.

MR. BLANC: He is using the word safely.

THE COURT: I didn't realize you used that expression.

gth 79 Gomez-redirect
recross

I sustain the objection as to form.

Q Were all the men in the after part of the ship at the time you gave your signal?

A Yes. They was out of the way.

Q Now, the beam that you spoke of that toppled over on the plaintiff, that was not any of the beams that was in the draft, was it?

A No.

Q That was separate and apart from the draft?

A Right.

Q And this beam that toppled over,was it secured in any way?

A No.

MR. KLONSKY: That's all.

THE COURT: Mr. Cichanowicz.

THE WITNESS: Yes.

RECROSS EXAMINATION

BY MR. CICHANOWICZ:

Q Did you see this beam which you say was not secure before the accident happened?

A Before?

Q Yes. Did you see it before the accident happened?

A There was no lashings down there. I didn't see no chocks.

gth 81 Gomez-recross

there were no chocks there?

A I didn't look at no particular beams.

Q You didn't look at any particular beams?

A No. I just looked down the hold to see if it is level.

Q Everything was level, right?

A Yes. After that beam then there were no steel inshore.

Q In other words, that was the last beam in a layer of level beams, right?

A Correct.

Q That is the one that you say was knocked over?

A Correct.

Q And you stood there and watfhed this draft being dragged over some 35 feet, is that correct, without giving any signals?

A Yes.

Q Thank you.

RECROSS EXAMINATION

BY MR. COHEN:

Q How far away from the level of the beams were you standing?

A How far?

Here we go again. I don't know.

gth 85 Gomez-recross

Q Was it immediately after the accident happened that they told you that or was it just recently that somebody told you that?

A I don't know. I just found out that it was under there. Not lately. I don't know when.

Q All right, thank you.

THE COURT: Mr. Blanc?

RECROSS EXAMINATION

BY MR. BLANC:

Q You mentioned bracing or the question was asked of you whether you saw any bracing.

Will you tell us what bracing is?

A Yes. Well, wherever there is a space, they put a two by four in there and they make it secure.

Q How do they make it secure?

A Probably by hitting it with a sledge hammer. They put it to the size -- they measure the size of the hole from beam to beam and then they cut it with an angle on it and they put it in there and they hit it in with a sledge to make it tight.

Q Did you see any two by four bracing in that hold before the first draft went out that morning?

A No.

Q Did you see any beam in that hold secured brace

gth 86 Gomez-recross

with four by four timber?

A No. They might have been below, but I can't see below.

Q That you could see on the surface.

A Yes.

Q Was there any beam braced with four by four timber?

A Not that I know of.

MR. BLANC: That is all.

THE COURT: Mr. Klonsky?

MR. KLONSKY: I have nothing, your Honor.

THE COURT: All right. Thank you, Mr. Gomez, you may be excused.

(Witness excused)

THE COURT: Now we will take our luncheon recess.

Madam forelady and ladies and gentlemen of the jury, you may be excused for lunch until 2 o'clock.

Thank you.

(Luncheon recess.)

gtbr 1

1/76

AFTERNOON SESSION

2:00 p.m.

(In open court; jury not present.)

THE COURT: I understnad we are short a juror, but this may be an appropriate time for me to ask, why do we have a jury in this case?

MR. KLONSKY: Diversity of citizenship.

THE COURT: We finally guessed that and that is probably why you didn't sue Hoffman.

MR. KLONSKY: That is right.

THE COURT: All right.

In other words, if you didn't have diversity of citizenship, you would be in admiralty and you won't be entitled to a jury?

MR. KLONSKY: That is right.

THE COURT: But you have this savings to sue clause.

MR. KLONSKY: He can only be sued in state court in Jersey. But there is something that recently came down, though, Judge, which is a supplement on the Wasser case which says any time you can make a motion to bring a direct suit against the party, and let me see if I can find that for you.

114a

gtbr 2

THE COURT: Don't go through that.

I am satisfied that you are right, because you allege diversity of citizenship and there is.

MR. KLONSKY: If I brought in Hoffman, that would defeat diversity.

THE COURT: Of course.

Itwon't defeat your action, it would defeat your right to a jury.

MR. KLONSKY: That is right.

Are you famililar with the Wasser case, Judge? That came out of our circuit.

Plaintiff in diversity jurisdiction case may implead a third-party defendant.

That just came out in the January 27, 1976 issue of Law Week.

This is the Wasser decision that comes from our circuit (handing).

MR. CICHANOWICZ: Is that the Wasser case?

MR. KLONSKY: It is about the Wasser case or Wasser principle.

MR. COHEN: Without losing your diversity jurisdiction?

MR. KLONSKY: Yes.

MR. COHEN: What is the name of this case?

gtbr 2 Lopez-

MR. KLONSKY: I think it is a little more than that. I got a letter from somebody. I thought he had the same figure that I had. I will hold it in abeyance, your Honor, until I find that letter.

THE COURT: All right.

Then this figure is not agreed upon, is that right?

MR. KLONSKY: No, it is not.

THE COURT: All right.

MR. KLONSKY: Might I note for the court, for the benefit of the jury, that these moneys have to be repaid by the plaintiff?

THE COURT: Yes, all right.

MR.COHEN: That is not true under all circumstances. That is not correct.

THE COURT: All right. Then the jury will disregard this colloquy and I will tell the jury what the situation is in my instructions.

MR. KLONSKY: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Lopez, are you the plaintiff in this case?

A Yes, sir.

with ITO?

A I don't remember exactly, sir.

Q Were you a permanent member of a gang with ITO on the day of your accident?

A Yes, sir.

Q Before October 21, 1968, did you have any trouble with your left leg?

A No, sir.

Q Were you able to climb and go into holds and push cargo?

A Yes, sir. Yes, sir.

Q There came a time when you had an accident aboard a ship?

A Yes, sir.

Q What was the name of that ship, do you know?

A I can't think -- I can't pronounce the name?

Q You can't pronounce the name?

A No, sir.

Q Would the Jobst Olendorff refresh your memory?

A Yes, sir.

Q Who was the foreman or hatch boss of your gang?

A Mr. Joe Bars.

Q Joe Bars, B-a-r-s?

A Yes, sir.

gtbr 6 Lopez-direct

Q And were you aboard this ship to discharge steel cargo?

A Yes, sir.

Q And what was your job on this particular function?

A Holdman.

Q Holdman?

A Yes, sir.

Q What time did you come to work that day?

A 8 o'clock.

Q And about what time did the accident happen?

A I say between 8 o'clock and 8:20.

Q Was this the first draft that was being discharged?

A Yes, sir.

Q Could you tell us how many pieces of steel were in this draft, this first draft?

A I don't know exactly how many pieces, sir.

Q Were you one of the four men who put chains around the draft?

A Yes.

Q Do you know how long the beams were?

A I don't know how long it was, but I said 25 feet or over. I don't know for sure.

Q Tell me if I understand you correctly.

This end was what, oppostie the square of the hatch or was it way up forward?

A This was --

Q The place where you were standing was the square of the hatch, right --

A Offshore by the center of the hatch.

Q About where were you? Were you about the middle of the square of the hatch?

A The hatch, yes, offshore.

Q After you put the chain on, did you then help to hook up the chain to the hook of the crane?

A Yes, sir.

Q And after you did that, what did you do?

A I walk across the ship to inshore in the back side the ship.

Q In other words, you walked across -- what did you walk on?

A Top of the steel.

Q Was this steel even and level where you walked on it?

A In the square is even.

Q The steel in the square of the hatch was level, is that correct?

gtbr 26 Lopez-cross

A Yes, sir.

Q And where this draft was, that was a little higher than the square of the hatch, is that right?

A Yes, sir.

Q And did you have some cargo on the inshore side that was a little bit higher than the square of the hatch?

A Yes, sir. About in the square, sir.

Q So that the square was level, was stowed level, is that right?

A The square, yes, sir.

Q And then on each side under the wings they had a little more cargo a little higher than it was in the square, is that right?

A No exactly in the side. About a foot to the side.

Q Yes. But it was in the wing, right?

A Well, not too much wing in there, sir. About a foot the side of the ship you had three beams on top the steel.

Q That was on each side of the square of the hatch?

A Yes, sir.

Q While you were down there, Mr. Lopez, before your accident occurred, besides the three other longshoremen

who were making up the draft, did you see anybody else in the hatch?

A Yes, sir.

Q And do you know who he was?

A I don't know, sir.

Q What was he doing?

A He look the steel. He check the steel.

Q He was around inspecting the steel?

A Yes, sir.

Q And was he there -- this was before you started to hook up, is that correct?

A Yes, sir.

Q Thank you.

CROSS EXAMINATION

BY MR. COHEN:

Q Mr. Lopez, I am going to ask you a few questions. If you don't understand my questions, would you please let me know and I will try to rephrase it.

A Okay, sir.

Q It is important we understand each other. Allright?

From the point where the draft was made up to the point where your accident happened, approximately what was that distance?

MR. COHEN: Yes. I am sorry.

THE COURT: Mr. Blanc.

CROSS EXAMINATION

BY MR. BLANC:

Q Did any of the four longshoremen, including yourself, who were in the hold where the beams were stowed and from which they were being discharged tell the gangwayman to signal the crane operator to raise the draft of beams after you had made it up?

A No, sir.

THE COURT: Mr. Blanc, who is the gangwayman? I don't know that expression.

MR. BLANC: The signalman and the gangwayman are the same.

THE COURT: The signalman?

MR. BLANC: Yes.

THE COURT: I take it thatwould be Gomez here?

MR. BLACN: That is correct.

THE COURT: All right. I just don't know the word.

Q Is it correct that the signalman is supposed to signal for listing the draft after you get in the clear, you and the other three longshoremen?

A I think so, sir.

gtbr 30 Lopez-cross

THE COURT: I beg your pardon, what did you say?

THE WITNESS: I said yes, sir.

THE COURT: You think so?

THE WITNESS: I think so.

THE COURT: He is to wait until you and the others get in the clear before he gives the signal?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q At the time of your accident, did the draft start to rise before you got in the clear?

A When you hook them up the draft, sir, I no here any more draft to me turn around in the wing. When I turn around in the wing, that is when the beam took me down. By that time I see the draft on top the beam.

Q You don't know whether that draft started to rise before you got to where you were struck?

A No, sir.

Q And the longshoremen who worked with you in putting the chain on the after end of the beam, did he walk with you, also?

A I think so. I no know too sure.

Q And is it correct thatyou walked about 25 feet before you were struck?

A Or over.

Q Over that?

A I think so. I don't know how wide the hatch is. I don't know how wide the hatch is.

Q About how many steps did you take?

A Oh, I don't know, sir.

Q Where did the men who put the chain on the forward end of the beam go after the chain was secured to the hook at the end of the fall from the crane?

A I think it go to the back of the ship, too, sir.

Q And did they go to the offshore side or the partition?

A I think offshore.

Q So the two of you went offshore.

Where did your partner go? Did he go to the inshore side of the partition or did he go with the other two men to the offshore side?

A He was with me inshore.

Q And was he walking ahead of you at the time you were struck?

A Yes, sir. Yes,sir.

A He was further into that forward -- I am sorry -- inshore after end?

A Yes, sir.

gtbr 32

MR. BLANC: That is all I have, your Honor.

THE COURT: Mr. Klonsky?

MR. KLONSKY: I don't have any questions.

THE COURT: All right. Thank you, Mr. Lopez.

(Witness excused.)

MR. KLONSKY: I call my next witness.

For the sake of the record, your Honor, may we mark Exhibits 10-A and 10-B for identification in evidence.

THE COURT: Those were the more recent X-rays from Dr. Grynbaum?

MR. KLONSKY: That is right.

THE COURT: Any objection?

MR. CICHANOWICZ: No objection.

THE COURT: All right. Without objection they may be received. Mark them.

(Plaintiff's Exhibits 10-A and 10-B, respectively, were received in evidence.)

J O H N S C E R E N S E S, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KONSKY:

Q Mr. Scerenses, I just have a few questions to ask you.

gtbr 33 Scerenses-direct

Were you employed by ITO on October 21, 1968 as a longshoreman?

A Yes.

Q How long had you worked as a longshoreman before that date?

A How long?

Four years.

Q And are you now employed as a longshoreman?

A Yes.

Q And by whom are you employed?

A ITO.

Q On October 21, 1968, was the plaintiff one of your gang?

A Yes.

Q Permanent member?

A Yes.

Q Was he a holdman?

A Yes.

Q On that date, did you report to work aboard a vessel to discharge steel?

A Yes.

Q About what time was that?

A You mean --

Q The time you reported to work.

A 8 o'clock in the morning.

Q Did your gang have anything to do with raising the covers or removing lashings?

A No.

Q Were the covers off when you got there?

A Yes.

Q And what did you observe with respect to the lashings and chockings of the cargo in that hatch?

A Well, the steel wasn't lashed and it wasn't chocked.

Q Do you know who removed the lashings and the chocks?

A No. I guess the ship's crew.

Q It wasn't your gang any way?

A No, sir.

Q Did you work in the hold?

A Yes, yes.

Q Did you work on the first draft?

A Yes.

Q And was Mr. Lopez your partner or partner of someone else?

A He is my partner.

Q There were two of you at one end of this draft and two on the other end, right?

gtbr 35 Scerenses-direct

A Yes.

Q Do you recall which end it was that you and the plaintiff worked?

A Which end?

Q Yes.

A We worked the aft end.

Q At the aft end?

A Right.

Q And were you hooking up a draft of steel beams from the offshore side?

A Yes.

Q Do you recall how long these beams were?

A No, not exactly. 30 or 40 feet or something. I don't recall exactly.

Q You don't know exactly?

A No, sir.

Q Do you know how many pieces of steel you had in the draft?

A How many pieces?

Q Yes.

A No, I don't recall exactly.

Q When the draft was made up, was it at both ends with chain slings around?

A Yes.

gtbr 36 Scerenses-direct

Q How many turns of the chain sling did you make at your end?

A On my end?

Q Yes.

A One.

Q How many turns were on the other end, the forward end?

A I guess two.

Q Did this create a situation where the beams would go out at an angle?

MR. CICHANOWICZ: Objection, your Honor. The questions are leading. I am sorry.

THE COURT: I will permit it. Overruled.

Q Sir, after you had put the chains on and put them onto the cargo hook of this boom that was over the area, where did you go?

A I went back inshore under the wing.

Q And where did the plaintiff go?

A Toward the skin of the ship. He went the same way, the same way we walked.

Q How distant were you from theplaintiff at the time you were struck?

A Possibly two feet.

Q What did you see happen?

gtbr 37 Scerenses-direct

A Well, I saw the steel beam strike his leg, pinned him to the floor.

Q Which steel beam?

A The loose beam that was sticking close to under the coaming.

Q Which coaming are you talking about, the after end?

A The coaming inshore.

Q The inshore after coaming, is that right?

A Right.

Q Was this where there was a divider?

A Yes, sir.

MR. CICHANOWICZ: Your Honor, I object to this. I don't mind leading questions, but Mr. Klonsky is testifying and I think it is time that --

THE COURT: Yes, I think Mr. Klonsky ought to avoid asking leading questions.

MR. KLONSKY: All right.

Q What was the construction of the after end wings? What was there as far as construction is concerned? What did it look like?

A They had a partition sticking out in the middle of the -- from the rear end of the ship sticking out probably ten, twelve feet.

gtbr 38 Scerenses-direct

Q And did this go into the square or did it stop just before the square?

A It stopped just before it got into the square.

Q And on which side of this partition were you?

A I was in the back.

Q Was it inshore or offshore back?

A Inshore.

Q Was the plaintiff with you at that time?

A Yes, sir.

Q And what did you see with respect to the movement of the draft?

A I didn't see the draft too good. When I looked up I saw the steel beam topple over.

Q You actually saw it topple over?

A Yes, sir.

Q Did you see what caused it to topple over?

A No, sir.

Q Did you see it stricken by the draft of the steel beam?

MR. COHEN: He said he didn't see what caused anything, your Honor.

MR. KLONSKY: All right.

Q Now, sir, before you made up this draft, were any tag lines provided?

gtbr 40 Scerenses-cross

CROSS EXAMINATION

BY MR. CICHANOWICZ:

Q In order to remove cargo from a hatch that has been lashed, do the lashing have to be removed?

A Yes, sir.

Q And that is usually done by the ship's crew before the longshoremen go on board the ship to work, is that right?

A Sometimes.

Q Yes. But, I mean, in other words, when you come on board, you expect the ship to be ready for you to discharge cargo, is that correct?

A Well, yes. But don't expect to have all the lashings off.

Q But you can't remove cargo unless the lashings are off, is that right?

A You remove just enough to take the draft off so the steel would be secure.

Q And if these lashings run from one side to the other side of the hatch, how do you take that off so you can only take out the draft that you are going to take out?

A Well, most of the time they don't run from one sideside to the other.

Q But if they run from one side to the other, how do

gtbr 45 Scerenses-cross

should get up and make statements.

MR. KLONSKY: I made an objection.

THE COURT: If it is an objection, I will overrule.

Let us go on.

MR.CICHANOWICZ: May we have the question.

(Record read.)

THE COURT: I take it you mean the cargo in the hold?

MR. CICHANOWICZ: That is right, yes.

THE COURT: All right.

A Okay, true.

Q These steel beams that you made into a draft before the accident, was that laying on dunnage or wood?

A Right. They had enough dunnage there so you could slip that chain under to hook it.

Q Did you see any other separations like that in this hatch so you could remove the other beams?

A I guess they had dunnage under the beams.

MR. KLONSKY: I don't think that is responsive, your Honor.

THE COURT: I will let it stand.

Q You say thatyou were walking with Mr. Lopez before his accident happened?

gtbr 46 Scerenses-cross

A Yes. I was in front of Mr. Lopez walking back. I was the first one back.

Q And where were you? Were you in the square of the hatch or were you in the wing?

A I was back in the wing.

Q How far into the wing were you?

A About five foot from the back end.

Q And this bulkhead that was there or partition -- I am sorry, this partition, what did it do, come out about five feet?

A About ten or 12 feet I think.

Q Did it have steel beams stowed on each side?

A The steel beams stuck beyond the partition. I don't know however.

Q How did this partition run, from front to back?

A Right, straight.

Q But in which direction?

A From the back end it run toward the front.

Q Did it have steel beams on each side of the partition?

A Yes, sir. Yes, sir.

Q And did it have pieces of wood stuck in between wherever there were openings?

A I don't know.

gtbr 51 Scerenses-cross

MR. KLONSKY: Yes, I have it.

MR. COHEN: It is labeled at the top "Benito Lopez Injury 10/21/68, 8:20 a.m."

Underneath that, "February 26, 1969."

(Mr. Cohen read from Defendant ITO Exhibit C in evidence to the jury.)

Q Could you explain to us, sir, from where it was that you saw Mr. Lopez jump?

A Where he jumped?

Well, he was a couple of feet in front of me.

Q He was a couple of feet in front of you?

A Right, sir.

Q I thought you said a few moments ago that you were a couple of feet in front of him.

A No, I was behind Benny Lopez.

Q You were behind Benny?

A Yes, sir, back close to the wing.

Q Let us see --

A He was in front of me.

Q Let us see if he can get this straight.

You had made up a draft and hooked it onto the crane hook on the offshore side of the hatch, is that correct?

A That is correct.

Q And then you and Benny started walking toward the

gtbr 57 Scerenses-cross

A The side, the skin of the ship.

Q Mr. Klonsky used the term skin of the ship. Does that mean side?

A Yes.

Q Inshore?

A Inshore the wing all the way back in the back.

Q As you had walked from where the draft was hooked onto the Hoffman crane, you walked over the beams that were stowed in that hold, is that right?

A Yes, sir.

Q And were they level, as other witnesses have testified?

A Yes, sir.

Q When you reached that point you have described, you turned around and you then saw Mr. Lopez in front of your eyes, is that correct?

A Right.

Q And approximately how many feet in front of your eyes did you see him at that point when you turned around?

A He was approximately a couple, two or three feet. A couple of feet.

Q At that point you say you saw him jump from something?

A I saw him fall when the beam struck him.

gt:mg 6 Scerencses-redirect/recross

THE COURT: All right, Mr. Klonsky.

REDIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Scerencses, did you see the draft just before it came towards the inshore side?

A Yes. When I turned around I saw the draft sliding along the floor. Yes, sir.

Q What did you see the draft do?

A It struck the beams and toppled one over on Mr. Lopez' leg.

Q You saw that?

A Yes, sir.

Q And the beam that toppled over, was it secured in any way?

A No, sir.

MR. KLONSKY: That's it. Thank you.

THE COURT: Mr. Cichanowicz?

RECROSS-EXAMINATION

BY MR. CICHANOWICZ:

Q This beam that was toppled over, was that laying flat on the other cargo?

A It was in an upright position setting on the steel, on the floor.

Q Was it on other steel?

THE COURT: Anything else?

MR. KLONSKY: Nother further from me.

THE COURT: All right. Thank you very much. You may be excused.

(Witness excused)

THE COURT: All right, the next witness.

MR. KLONSKY: Captain Ash.

WILLIAM CHESTER ASH, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Captain Ash, what is your livelihood?

A I'm a marine consultant.

Q In your past, were you a merchant mariner?

A Oh, yes.

Q Could you give us the benefit of your background with respect to your service at sea, the nature of the work you did as a teacher, and also as a cargo expert?

A I started going to sea as an ordinary seaman in 1927.

In 1928 I was rated an able-bodied seaman on examination as to my knowledge of the duties of seamanship.

I sailed for four and a half years on cargo vessels,

gt:mg 33 Ash- direct

Captain, relating this to the case at hand, please assume that there were some beams located on the inshore side of the divider extending for a distance of 27 feet so it would go beyond the divider into the square of the hatch but it was on the inshore side of that divider, and before the men came to work that day, the crew came aboard and went down into that hatch and removed the shoring, the chocking, the dunnage, whatever there was, and left it as an unsecured area of cargo; that from the offshore side they had a draft made up of steel beams about 62 feet in length which was to be discharged by a shore crane in the inshore side, of course.

Now, do you have an opinion based on your expertise as to whether the absence of chocking and lashing on the inshore side of the 27 feet beams represented a safe or unsafe condition?

MR. CICHANOWICZ: Objection, your Honor.

THE COURT: Overruled.

A Yes, I have an opinion.

Q What is your opinion, Captain?

A My opinion was that it was unsafe to remove any blocking, chocking or shoring from these beams until you were ready to actually lash them and heave them out.

Q In other words, until you were ready to take those beams on the inshore side out?

gt:mg 34 Ash-direct

A Yes.

Q Captain, what is the practice with respect to this kind of steel beam discharge with respect to tag lines?

MR. CICHANOWICZ: Objection, your Honor.

THE COURT: May I hear the question?

(Record read)

THE COURT: Overruled.

MR. CICHANOWICZ: Objection, your Honor. It has nothing to do with the defendant. This is a responsibility of the stevedore.

MR. KLONSKY: I object to that, your Honor. That is a matter of law which your Honor will charge on, whose responsibility it is initially.

THE COURT: That may well be, but we have taken a lot of evidence about the longshoreman and the crane operator, too.

All right.

A A tag line is another name for a guide line. It is tied onto a draft, a load, so that you can guide it while it is in motion.

There are lots of drafts that will just clear a hatch opening and if it swings it will hook on the hatch coaming and may break a wire or drop, so you have a tag line on that the men down below can just gently pull on or take a

THE COURT: Overruled.

A Yes, I do.

Q Please state it.

A There are two aspects of this situation.

One, the 27-foot beams, the I beams, that were in the port side covering about half of the area, which was the only proper sanctuary for a load on the starboard side, should have been secured and tommed or chocked until such time as they were ready to remove those particular beams.

And, second, the long steel 62-foot beams should have been held and guided and controlled with a tag line or guideline or lines in such a way that it couldn't swerve across the hatch and strike these loose beams and topple them.

If they had been properly chocked and those blocks were left in place until it was ready to take them out -- and it only takes a crowbar to knock those chocks out -- if they had been left in place, even if the beam had struck it, I don't think it would have toppled it. But inasmuch as there was no chocking, no obstruction, no lashing to hold those beams in place, then anything striking them could topple it over.

That's the first instance. So you have two instances.

I believe that the load should be kept under guidance with tag lines so it couldn't drift and also the chocking should not have been removed until such time as they were ready to put a sling under those 27-foot beams and take them out.

MR. KLONSKY: Your witness.

CROSS-EXAMINATION

BY MR. CICHANOWICZ:

Q Captain, whose function is to to use the guidelines and guide the draft?

A The longshoremen.

Q What you are saying is if the beam that was dislodged was either chocked or braced, that would have been good stowage, is that correct?

A If they were braced and chocked, it would have been good stowage, but it still does not eliminate the need for the guidelines.

There are other reasons for needing the guidelines.

Q But I am saying, if this beam was braced, then it would eliminate this other criticism which you have of the stowage, is that correct?

A Not 100%, but it would have eliminated probably that accident.

Q Of course, this lashing, you take lashings off

gt:mg 62 Ash- cross

Q You disagree?

A Yes, sir.

MR. KLONSKY: Are you going to read the exhibit, Mr. Cichanowicz?

MR. CICHANOWICZ: Give me a minute.

Q I think you also in connection with this testimony expressed some thoughts on if the cargo isn't properly secured it will topple, slide, move out of position; right?

A Yes.

Q In this case, this beam that toppled over did not move out of position of its own accord, did it?

A No,not of its own accord.

Q It was knocked out of position, right?

A Yes, sir. Yes, yes.

Q So that it was dislodged by some outside force, is that correct?

A That's what actually happened.

Q And you say this was -- according to the testimony, this was a draft that swung over as it was being discharged and dislodged it, is that correct?

A Yes, that is correct.

Q It didn't topple over of its own accord, it didn't move of its own accord?

A That's right. That's correct.

gt:mg 78 Ash - cross

Q That book that you looked to, the first book, I forget the name --

A Ford.

Q Yes.

Can you show me that--

MR. KLONSKY: Page 285.

Q Thank you. I will find the page.

A 285.

Q Of the two sentences you read, it concluded: "It is dangerous to allow men to attempt guidance otherwise" -- otherwise meaning without tag lines?

A Yes. It means pushing it by hand.

Q Did you hear any testimony in this case from any of the longshoremen who testified that they were trying to push this draft by hand?

A No.

MR. KLONSKY: Objection, your Honor.

THE COURT: Overruled.

A No, I heard no such testimony .

Q As a matter of fact, didn't you hear each of the people who was there and saw and observed what happened testify that they had all gone away from this draft, no one was touching it with their hands or anything else?

A I agree, yes.

gt:mg 79 Ash - cross

Q The force required to suddenly swing a draft weighing 20 tons, I think you said, from its position on the offshore side over to the inshore side would be a real considerable force, would it not?

A It would be a force sufficient to raise it, but-- it would have to start it in movement. Once it started in movement, its own weight would accelerate.

Q If it is being take up plumb in a straight line and then, as Mr. Gomez testified, the boom is topped, and as you agreed that would cause that draft to then swing over to the inshore side, that would be quite a force, would it not, that would cause a 20-ton draft to come swinging over?

A Sure.

Q And do you believe that a longshoreman who might hold a piece of rope attached to that draft could have prevented that type of a swinging over?

A A longshoreman would --

Q Can you just answer that question?

A No.

Q OK.

MR. COHEN: May I just have a moment, your Honor, to check my notes? I think I have no more questions.

MR. KLONSKY: Can we have a recess at this time,

gt:mg 85 Ash - redirect

There are lots of small drafts that only encompass 10, 12 feet and you can yank them right out, you don't need any guidance. They can go up and it wouldn't strike anything.

Q If there is necessary communication between the longshore signalman and the crane operator and you have 62-foot beams, how would the crane operator know, if you know, what the length of the beams are for which he has to make movement?

MR. COHEN: Objection.

MR. BLANC: Objection.

MR. KLONSKY: How would he find out?

THE COURT: It is pretty obvious. The answer is he wouldn't.

MR. KLONSKY: That's right.

THE COURT: Isn't that the answer?

THE WITNESS: Yes,your Honor.

THE COURT: If he can't see the load, he can't know what the load is.

Q Captain, would you please --

MR. KLONSKY: Do you have that exhibit, Hansen's statement?

Q Captain, you said you read the statement of Surveyor Hansen before you testified today?

A As one of the many things I read, yes.

Q Would you kindly read this statement to the jury?

A "Injury to Longshoreman Mr. B. Lopez.

"On October 21, at about 0820 hours, while attending on board, I noted that a longshoreman by the name of B. Lopez was injured during the discharging of steel beams from No. 1 hatch.

"On the starboard side of No. 1 hold a lift consisting of about seven beams marked to be 62 feet long, was made up with two chain slings at the middle spread apart. When the lift was ready, the longshoreman went over to the port side afterpart in order to get out of the way.

"During that maneuvering, in order to get the lift through the hatch square, which was 18 meters or 59 feet long, the after part of the lift suddenly swung over to the port side and hit an H beam, which was stowed on edges and somewhat higher than the other beams in the same area.

"The beam first rolled over on its flange and then landed on the opposite edge.

"The beam was marked DSS1035ASTM36-6714-16-219 item 13 and measured 16 inches x 16 inches x 26 feet, 7-1/2 inches long, said to weigh 2.6 long tons.

"Mr. Lopez was standing next to the beam and got his left leg caught underneath same.

"The lift of about seven beams swung further over to the port side where it was landed and unhooked.

"The beam was then removed from Mr. Lopez' leg with a hook at each end.

"The accident was witnessed by Mr. I. Gutierrez and another longshoreman whose name I did not get.

"He went to the hospital with the injured.

"The ship had no list and the stowage was normal, wherefore it is my opinion that the accident was no fault of the ship."

It is signed Captain J. Stave.

Q Captain, do you have an opinion as to whether this accident was the fault of the ship?

MR. CICHANOWICZ: Objection, your Honor.

THE COURT: Yes. Sustained.

That is a question for the jury.

MR. KLONSKY: Yes. That is why I moved to strike that last paragraph.

I have nothing further.

THE COURT: All right.

Mr. Cichanowicz?

MR. CICHANOWICZ: No further questions.

THE COURT: Mr. Cohen?

MR. COHEN: Nothing further.

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gt:mg 1 99 Hansen-direct

AFTERNOON SESSION

2:00 p.m.

(In open court, jury present)

THE COURT: All right, Mr. Cichanowicz.

MR. CICHANOWICZ: Thank you.

I would like to call Captain Hansen.

MR. BLANC: Excuse me, your Honor.

Before that is done, there will be no further cross-examination of Captain Ash.

THE COURT: Thank you very much.

I had overlooked that entirely.

Thank you very much, Mr. Blanc, very much. I had made a note in my papers, but I left them downstairs.

Captain Ash, you may be excused. Thank you.

C A R E W. H A N S E N, called as a witness by defendant Egan Oldendorff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CICHANOWICZ:

Q Captain Hansen, what is your occupation or business?

A Marine and cargo surveyor.

Q Could you tell us a little about what your training and background is.

gt:mg 102 Hansen-direct

opportunity to inspect other ships carrying steel beams and steel cargoes?

A Yes, sir.

Q On October 21, 1968, did you go on board the Jobst Oldendorff?

A Yes, I did.

Q And was that in connection with some surveying work that you were to do?

A Yes. I was requested by the charterer's agent, Kersten Shipping, to go on board and examine the stowage and the ship.

Q At that time you were acting actually -- you were retained by the time charterer, is that correct?

A Time charterer's agent.

Q But you were working on behalf of the time charterer?

A That is correct.

Q And when did you get on board the ship on October 21, 1968?

A Shortly before eight, about a quarter to eight.

Q And were you on board the ship when an accident happened to a longshoreman by the name of Benito Lopez?

A Yes, I was.

Q Where were you at the time that the accident

happened?

A I was at No. 1 hatch, port side, after part, up against the after bulkhead.

Q Up against the after bulkhead?

A Yes, facing the bulkhead.

Q Under the after wing?

A Right, away from the hatch square.

Q When had you gone down into No. 1 hatch on that day?

A About eight o'clock.

Q During that time, from eight o'clock until the time of the accident, did any other people come down?

A A few longshoremen. Three or four longshoremen.

Q During that period of time, did any crew members come down?

A No, I didn't see any.

Q Before you went into No. 1 hatch, did you first look into --was the hatch open at the time you came on board the ship?

A Yes, sir.

Q And did you proceed to No. 1 hatch?

A Yes.

Q Was that the first hatch that you conducted your surveying or inspection of?

gt:mg 105 Hansen-direct

Q Captain Hansen, I show you two other photographs, and ask you if you would look at those and tell us are these enlargements of those two photographs which we have just marked as C and D for identification?

A Yes, that is correct.

MR. CICHANOWICZ: May I have these marked, please?

THE COURT: Shouldn't we mark them, Mr. Clerk, C-1 and D-1?

THE CLERK: Yes.

THE COURT: Mr. Cichanowicz, be sure to match them up so that C-1 relates to C.

xx (Defendant Oldendorff Exhibits C-1 and D-1, respectively, marked for identification)

Q Captain, do these photographs which you have just looked at, are they a fair and reasonable respresentation of certain areas of the No. 1 hatch on October 21, 1968?

A Yes, I would say so.

THE COURT: Before the accident, Captain?

THE WITNESS: Yes.

MR. CICHANOWICZ: Before the accident, yes.

THE WITNESS: When I saw the rust I took the pictures, and then I went down there to examine the steel.

Q Do these photographs show the beam that was

if it should be marked the same way as this picture, it should have been on top there, too. It is pointing toward the beam.

Q So you put an X there to indicate the beam?

A On the beam. The same here (indicating)

THE COURT: All right.

If you don't want to ask the captain any more questions about the pictures, let us give them to Madam Foreman and then the jury can look at them.

MR. KLONSKY: Can I ask a few questions on the picture?

MR. CICHANOWICZ: No.

THE COURT: No, no. They have been admitted in evidence. You will be able to cross-examine.

All right, you may return to the stand, Captain.

Thank you.

We can go ahead, Mr. Cichanowicz.

MR. CICHANOWICZ: I did want to ask questions on these photographs. It creates a problem.

THE COURT: All right. Let us give the jury a chance to see them.

(Pause)

Q Captain, would you look at these two photographs, C-1 and D-1, and tell us whether they show any braces or

chocks (handing)?

A Yes.

C-1 shows the beam in question to have a big wooden brace on the left side there towards the ship's side.

Q Would you mark that with the letter W for wood?

A B for brace?

Q Make it B.

THE COURT: All right. B.

(Witness complied)

Q Do you see any other bracings in this photograph?

A Yes. There are braces --

Q Or chocks, let's say?

(Witness complied)

THE COURT: Are you making other markings on the picture?

MR. CICHANOWICZ: Yes. He is indicating other bracing or chocks on the photograph.

MR. KLONSKY: Are there two B's?

MR. CICHANOWICZ: There are three now.

MR. KLONSKY: Two B's I thought for braces.

MR. CICHANOWICZ: No.

MR. KLONSKY: How has he marked these two?

THE COURT: The witness is marking with the letter B what he refers to as braces or chocks which can be seen in

gt:mg 116 Hansen-direct

the photograph.

Is that correct, Captain?

THE WITNESS: That is correct, sir.

THE COURT: And there are three of them so far?

MR. CICHANOWICZ: He has indicated on Defendant's Exhibit C-1.

Q Do you see any others?

(Witness complied)

A I think that's it.

Q Would you indicate on D-1 with the letter B the bracings and chocks?

(Witness complied)

(Pause)

THE COURT: Has the captain completed his task?

MR. CICHANOWICZ: I believe so.

THE COURT: Just for the record, Mr. Cichanowicz, let's indicate on Exhibit C-1 how many B's there are and on Exhibit D-1.

MR. CICHANOWICZ: On Exhibit C-1, there are eight. On Exhibit D-1, there are eleven.

Q Captain, how many bracings are there on the beam that was involved in the accident?

A She has one on each end.

MR. CICHANOWICZ: Your Honor, may I show these to

lashes taken off or were they off at that time?

A The lashes were removed.

Q Had they been taken off before?

A Before I came on board.

Q Do you know what type of lashes were on?

A Usually they have chain slings, chains going across the top there.

Q All the way across?

A Yes.

I have seen that on previous visits on the ship.

Q And in order to discharge any cargo, you have to remove these lashings, is that right?

A That is correct.

Q Did you actually see the accident occur or not?

A No, sir.

Q I think you said you were in the after--

A The after part of the No. 1 hold on the port side facing the bulkhead.

Q And was your attention called to an accident happening?

A Yes.

Q How did you find out about the accident?

A I heard a fellow scream.

Q What did you do then?

gtbr 11

negligence and unseaworthiness.

I now submit to your Honor that in view of the testimony of the surveyor Captain Hansen, more importantly the photographs that he took both shortly before and immediately following the accident showing the presence of wooden checking and shoring, has now created a situation whereby reasonable men could not reasonably conclude that there was no chocking as had been claimed, and I submit this case should be dismissed or a verdict directed in favor of the defendant.

THE COURT: Mr. Blanc?

MR. BLANC: I join in the motions of both Mr. Cichanowicz and Mr. Cohen for the same grounds stated and wish to add that there is absolutely no evidence in this case that can be believed by any juror that there was any negligence on the part of the vessel or any unseaworthiness on the part of the vessel and that, therefore, the plaintiff's case should be either dismissed or there should be a directed verdict for the defendant.

THE COURT: I am satisfied that I ought to submit the case to the jury.

Aside from the evidence of Captain Ash, there was probably enough evidence for a jury question as to whether the lashings and the chocks should have been removed,

gtbr 12

if they were removed.

There is a question of fact as to whether they were removed ornot. The lashings were apparently removed. If the jury believed Captain Hansen, the chocks or the braces weren't removed.

If you believe the evidence for the plaintiff, the jury could probably find that they were removed.

It seems to me it is a typical case, typical issue for the jury.

I had some doubt as to whether this was negligence or unseaworthiness, but in the case of doubt I think it better to resolve it in favor of submitting both claims, both negligence andunseaworthiness, on the issue whether at the time the load was formed the lashing and the chocks had been removed which may have been negligence or which, according to the plaintiffs claim, was negligence and which may have, by reason of such negligence, created an unseaworthy condition because it was no longer a safe place to work.

What I will say about the tag lines, I don't know. I am inclined to think that there is no issue for the jury on that, but I will just have to tell you about that Monday morning.

I think the stevedore, if tags should have been

gtbr 25

does not necessarily mean that thisplaintiff is out of court, because he has a direct action going --

THE COURT: I don't think that is a matter that concerns the jury whatever. They have to decide this case on the merits as between the plaintiff and the shipowner.

Now, I will reserve decision on it.

MR. COHEN: All right.

MR. KLONSKY: Your Honor, I have something to bring up.

These photographs that were marked by Mr. Cichanowicz were not noted in the pretrial memorandum as an exhibit to be presented in court.

MR. CICHANOWICZ: Oh, yes.

MR. KLONSKY: You say yes?

MR. CICHANOWICZ: Yes.

Your Honor, I served about two weeks ago a supplementary trial memorandum on Mr. Klonsky. I also served supplemental answers to interrogatories in which I advised Mr. Klonsky that we had these photographs.

MR. KLONSKY: Did you? I would like to see a copy.

MR. CICHANOWICZ: Yes.

MR. KLONSKY: May I see it? Is this it (indicating)?

gtbr 26

THE COURT: I don't like to exclude evidence because of some --

MR. CICHANOWICZ: Yes, your Honor.

I have dated January 26th a defendant's supplemental answers to interrogatories --

THE COURT: If you had brought this to my attention last week and if you had wanted any adjournment or time to get evidence of your own, I would have been prepared favorably to consider it. I wouldn't press it, then.

MR. CICHANOWICZ: I did serve you, Mr. Klonsky, on that.

MR. KLONSKY: All right. If you say so, I take your word for it.

There is an exhibit that doesn't seem to be found. Have you got that surveyor's report?

MR. CICHANOWICZ: I don't have that particular one, but I do have a copy of the same thing.

MR. KLONSKY: May I see it?

MR. CICHANOWICZ: It is not marked.

THE COURT: Let us take the requests to charge, because I have got to deal with that.

The plaintiff's request to charge:

If I say that I will give a charge, I don't mean that I will give it in the language requested,

gtbr 27

I mean that you can assume that I will give it in substance.

No. 1, yes.

No. 2, no, except, of course, I explain contributory and proximate cause.

No. 3, yes.

No. 4, no.

No. 5, yes.

No. 6, no.

No. 7, yes.

As to unseaworthiness, except, of course, operational negligence.

No. 8, yes.

No. 9, yes.

No. 10, yes, as modified. I think I refer to the difference between unseaworthiness and more familiar concepts. I don't use this language.

No. 11, yes.

No. 12, yes.

No. 13, yes, except operational negligence constituting unseaworthiness below the citation in No. 13.

MR. KLONSKY: That is "no"?

THE COURT: That is no.

Operational negligence, since the Usner case, does not constitute unseaworthiness, unless, and I have a

gtbr 28

fairly involved explanation, unless it produces a condition.

No. 14, yes.

No. 15, yes.

No. 16, no.

No. 17 -- I think No. 17 yes generally.

No. 18, yes.

No. 19, no.

No. 20, yes.

No. 21, yes.

No. 22, as far as the fault of Hoffman and the stevedore is concerned, that is included in what I charge as to unseaworthiness. The plaintiff's recovery is not predicated upon whether the third parties also were at fault and might later indemnify the shipowner. I will not give that.

No. 23, no.

No. 24, no.

No. 25, no.

No. 26, no.

No. 27, no.

The defendants request:

No. 1, yes.

No. 2, yes.

No. 3, yes.

gtbr 29

No. 4, no.

No. 5, yes.

No. 6, no.

No. 7, no.

No. 8, no.

No. 9, yes, except as to the first sentence.

No. 10, yes.

No. 11, yes.

No. 12, no.

No. 13, yes.

No. 14, yes.

No. 15, yes.

No. 16, yes.

And 17 through 20 I cover by instructions that the plaintiff's duty is to exercise reasonable care. I cover that in my own words.

No. 21, no.

I think I should give you the form of special verdict that we will take. Mr. Clerk, would you give this to counsel (handing).

Then I better put on my robe.

Incidentally, the foreman of the jury is not coming in today, so we will have to put in Alternate Juror No. 1. The clerk hands me a note saying "Mrs. Sherman

gt 40

THE COURT: Mr. Foreman, ladies of the jury:

At this stage of the trial you are about to enter upon you final and most important function, to decide the fact issues that are in the case.

You are the sole and exclusive judges of the facts. You determine the weight of the evidence, you pass upon the credibility of witnesses and you resolve such conflicts as there may be in the testimony.

It is your duty to accept my instructions as to the law and to apply them to the facts as found by you. In your determination of the facts, you must rely upon your own recollection of the evidence, which is what controls.

What I may have said from time to time or say in these instructions as to the facts, what counsel have said to you this morning in addressing you or at any other time during the trial is not to be taken in place of your own recollection, which is what controls.

Also the fact that I, the Court, have made rulings during the trial, have overruled or sustained objections is not to be taken as any indication of any views by me as to what you should decide or how you should decide the issues which are entrusted to you.

Occasionally you heard me ask questions of

gt 42

one witness or another. These questions were intended to make something clearer to the jury and are certainly not to be taken as any indication of any views by me as to the credibility of the witness or as to what your decision should be.

Now let us repeat the identification of the parties, because it is important for you and for all of us to keep their separate identities in mind.

Mr. Lopez, the plaintiff, was a longshoreman employed by a stevedore called International Terminal Operating Company, ITO for short.

Oldendorff, the defendant, is the owner of a ship, the Jobst Oldenforff, and he is usually called the ship owner.

On October 21, 1968, the ship was at Newark unloading steel beams, part of its cargo.

The time charterer, Wilson, as I said at the beginning, can be disregarded.

ITO, the stevedore, was engaged to unload the cargo, and Lopez, the plaintiff, as an ITO employee, was on the ship at Newark as a longshoreman helping to unload the cargo.

Hoffman Rigging and Crane Service, Incorporated, Hoffman for short, owned and operated a crane located on a

gt 43

pier alongside the ship and which crane was used to unload the ship by arrangement with ITO.

When the first load or draft of steel beams was in the process of being taken off the ship, Lopez, in the first hold, was injured as you have heard and as is undisputed.

Lopez sues the ship owner for damages, and his claim against the ship owner is the claim to be submitted to the jury for decision.

As I told you before, if the plaintiff Lopez recovers against the ship owner, there are also claims by the ship owner against ITO and Hoffman and cross claims by the defendants against each other, but these claims between ship owner, ITO and Hoffman are of no concern to the jury because, if necessary, they will be later decided by the Court, by me.

Mr. Lopez seeks recovery of damages from the ship owner on two separate theories:

First, that the vessel was unseaworthy and, second, that the ship owner was negligent.

Although each theory arises out of the same accident, different principles of law apply, and so it is necessary that we consider each theory separately.

First we will take up the claim that the ship

gt 44

was unseaworthy.

This claim is based upon an ancient law of the sea which imposes upon the owner of a ship the duty to supply the crew with a seaworthy vessel; that is, one reasonably fit for its intended use, or stating it another way, one reasonably adequate and fit for crew members to discharge their function.

The ship owner's duty to supply a seaworthy vessel extends to all parts of the ship, whether holds, equipment and all working areas used by the crew in the discharge of their duties. It also requires proper stowage and proper methods of unloading, and that equipment for such purpose, such as lashings, chocking, dunnage and the like, also measure up to the required standard.

Relinquishment by the ship owner of control of a ship to an independent stevedore, such as ITO, did not relieve the ship owner of his absolute non-delegable duty to supply a seaworthy vessel.

Lopez, as you know, was not a regular crew member, he was a longshoreman employed by ITO, which had been engaged to unload the vessel's cargo. In that circumstance, since Lopez, in working on the cargo was performing a job on board the vessel usually performed by the ship's crew, he, too, is entitled to the benefit of the

gt 45

warranty of seaworthy vessel just as if he was a regular crew member.

The ship owner's duty to supply such a seaworthy vessel, as I have already noted, extended to all parts of that vessel.

A ship owner is not relieved of his obligation to supply a seaworthy vessel by the fact that equipment which is used in the work is to be supplied by the stevedore. The ship owner's duty to provide a seaworthy vessel to Lopez was entirely independent of and separate from whatever duty Lopez' employer, ITO, owed to him. The ship owner's duty to supply a seaworthy vessel is absolute, that is, if the ship, working areas, stowage or manner of discharge, are not reasonably fit for intended use so that the areas are not reasonably safe for the men to work and as a proximate result a crew member, or as in this case a longshoreman doing a crew member's work, is injured, then the ship owner is liable for the resulting damage. This absolute liability is imposed even though the ship owner may have been free from fault and whether or not its officers knew of the defective or unseaworthy condition.

The method of unloading cargo or the manner of its stowage may contribute to create an unseaworthy condition.

gt 46

The ship owner's duty is a continuing one and, as I said, is not delegable; that is, it cannot be passed on to another person such as the stevedore ITO. And liability for an unseaworthy condition does not in any way depend upon negligence, fault or blame.

In short, even the exercise of reasonable care does not relieve the ship owner of his absolute duty to those engaged in the ship's service to furnish and maintain the ship and all working areas in a reasonably fit condition.

It is the fact of unseaworthiness, if you find such to be the fact, which renders the ship owner liable if, as a proximate result, a seaman or longshoreman sustains injuries.

Now, by proximate is meant an unbroken chain of events flowing from an unseaworthy condition or, as we shall later consider, a negligent act and leading to the injury complained of.

If the chain of events flowing from any unseaworthy condition is broken by some other intervening act which caused the injury, then proximate cause between the unseaworthy condition and the injury is not established.

In other words, there must be a causal relationship between the alleged unseaworthiness and the injury to the plaintiff.

gt 47

I have referred to the ship owner's absolute duty to furnish a seaworthy vessel. However, this does not mean that the owner was required to furnish an accident-free ship.

In deciding whether a vessel is seaworthy, the standard to be applied is not absolute perfection, but reasonable fitness. In short, the duty is to supply a vessel and appurtenances reasonably fit for their intended purpose.

The law distinguishes between a condition and an act which may or may not bring about a condition of unseaworthiness.

I must say frankly that this concept involves a rather fine distinction and some courts have referred to it as a metaphysical distinction or hair splitting, but nontheless it exists, and it is my duty to explain it as best I can.

I have already instructed you that unseaworthiness is a condition whereby a vessel or its working areas are not reasonably fit for the intended use, and if that condition of unfitness exists at the time of the accident, and as a result a crew member or longshoreman is injured, the ship owner is liable no matter how the condition was brought about or who brought it about.

gt 48

Indeed, if the condition exists, whether it was brought into existence by the ship's crew or a third party or even an injured person's fellow employee, the ship owner would still be liable.

But now let us suppose that we have a seaworthy vessel with equipment which is reasonably fit for the intended use and let us suppose that the operations of unloading are in process, and let us suppose that during the course of such operations the previously fit ship is rendered unsafe because of the negligent act of some person.

In such an instance, if the negligent act itself is in process and has not yet ripened into an unseaworthy condition, the act, during its commission, is referred to as "operational negligence," and in that circumstance the ship owner would not be liable.

In other words, if the defect arose as a momentary step or a phase in the progress of work aboard an otherwise seaworthy vessel and was an isolated incident in the continuous course of operations and an unseaworthy condition had not yet resulted, the ship owner is not liable.

On the other hand, if the isolated or momentary phase had ended and the act, the negligent act had ripened

gt 49

into a condition of unseaworthiness at the time the accident occurred, then the ship owner is responsible.

Thus, there is a point at which negligent conduct ends and an unseaworthy condition begins.

If the act results in a condition of unseaworthiness at the time of the accident, then the ship owner is liable. If the act falls short of creating an unseaworthy condition at the time of the accident, the ship owner is not liable.

Now, bear in mind that unseaworthiness is a condition and how that condition came into being, whether by negligence or otherwise, is irrelevant to the ship owner's liability if, in fact, it existed.

We have made general observations on the unseaworthiness doctrine. The trial took a comparatively short time and there is no need for a review of the evidence, and counsel for the parties this morning, in their summations, have emphasized the evidence upon which they rely to support their respective contentions.

The plaintiff was working in the hold of the ship. A load of steel beams was being hoisted out of the hold by a crane belonging to Hoffman and arranged for by ITO, and the crane was located on the pier. As the load was moved, it struct a stow of steel beams, causing one

gt 50

of those beams to topple onto the plaintiff's left leg, and injure it as you saw and heard.

The plaintiff urges that before the unloading by the stevedore began members of the ship's crew had removed lashings and chocks which secure the stow of beams and that the absence of such lashings and chocks caused the beam, which was part of the cargo, to fall on his leg when the beam was struck by the load. The removal of the lashings and chocks, the plaintiff says, created an unseaworthy condition in the ship's hold No. 1.

The plaintiff makes the further argument that the method of operation used in unloading the cargo was improper and constituted an unseaworthy condition.

In sum, his contention is that this was not a case of an isolated personal negligent act of a fellow longshoreman or a crane operator, what is usually termed and what I mentioned a moment ago is called operational negligence, but the plaintiff would say it was a condition which existed and which continued through the entire unloading operation and, as such, constituted unseaworthiness of the vessel.

The defendant ship owner, on the other hand, disputes these various claims of alleged unseaworthiness. He contends that there was no unseaworthy condition

gt 51

of any kind. He urges that stowage was entirely proper for safe discharge and he denies that the chocks had been removed by the ship's crew prior to the unloading and he points to the testimony of Captain Hansen and the photographs in this regard.

Finally, the defendant would contend that even if you found the vessel to be unseaworthy, that Lopez, if not solely responsible for the accident, nevertheless, contributed in part to its occurrence by his own negligent conduct and that the damages should be reduced accordingly.

This refers to a doctrine called comparative negligence, which I will discuss more fully in a few moments, when I take up with you the question of damages.

The mere fact that the accident occurred and that Lopez was injured as a result does not by itself establish unseaworthiness or entitle plaintiff to a recovery of damages.

The ship owner was not an insurer of Lopez' safety.

The plaintiff having made the charge that an unseaworthy condition existed at the time of the accident, has the burden of proving it, and also that it was a proximate cause of the accident, and his burden is to prove that by what the law terms a fair preponderance of

gt 52

the evidence.

What do we mean by fair preponderance of the evidence?

This refers to the quality of the evidence rather than the number of witnesses.

To establish a claim by the fair preponderance of the evidence means simply to prove that something is more likely so than not. It means that the evidence submitted by the plaintiff must be more persuasive and more convincing than that opposed to it.

You should review all the evidence, all the probabilities in making your determination as to whether or not the plaintiff, Mr. Lopez, by the weight of the credible, the believable evidence, has sustained his burden of proving unseaworthiness.

You should not speculate as to whether the ship was unseaworthy. Your determination must be based upon the facts and the reasonable inferences from the facts as you may find them.

Direct evidence is not required. Your determination may rest upon circumstantial evidence which oft times may be more persuasive than direct evidence.

Should you find upon all the evidence unseaworthiness, the plaintiff, Mr. Lopez, did not assume the

gt 53

risk of working on the vessel. However, this did not relieve him of his duty to exercise reasonable care for his own safety commensurate with all the attendant circumstances. And if he failed to do so and thereby also contributed to the accident, this would go to reduce damages as to which, in a few moments, I will instruct you.

Now let us consider the altertative or second theory of the plaintiff for his claim against the ship owner.

Entirely apart from his unseaworthiness theory, plaintiff advances an entirely separate theory that the defendant ship owner was negligent, and you must consider and make a separate determination as to this second or alternative theory no matter how you decide the unseaworthiness theory.

This second or alternative theory invokes a different concept of law.

Lopez, as an employee of ITO, the stevedore, which had been engaged to unload the vessel, obviously had to enter upon the vessel to do his job. Accordingly, the ship owner, entirely aside from his duty to supply a seaworthy vessel, also owed to Lopez the duty to exercise reasonable care to provide them with a reasonably safe

gt 54

place in which to work. And plaintiff's theory and claim here is that the defendant ship owner breached that duty, that he was negligent.

Negligence is the failure to use ordinary and reasonable care under all the circumstances. It is doing that which a reasonably prudent person would not have done or failing to do that which a reasonably prudent person would have done under all the circumstances of a given situation.

If the defendant was negligent and if such negligence, in whole or in part, was a proximate cause of Lopez' injury, the defendant ship owner would be liable for the damages.

Plaintiff here, too, has the burden of proof. Thus, to succeed on this second or alternative theory, he must establish by a fair preponderance of the evidence the negligence of the defendant ship owner, and that such negligence was the proximate cause of his injury.

You will recall that under the unseaworthiness theory it matters not whether the defendant exercised reasonable care or whether he and, of course, this means also the ship's officers and crew, knew or did not know of the alleged condition.

If, in fact, a condition of unseaworthiness

gt 55

existed which was a proximate cause of the accident, that is sufficient to make the defendant ship owner liable.

The rule under the negligence claim is different. The defendant cannot be held liable unless the ship's officers knew, or in the exercise of reasonable care should have known, of a claimed unsafe condition.

Plaintiff, Mr. Lopez, to establish that the defendant ship owner failed in its duty, generally relies upon the evidence offered in support of that part of his unseaworthiness claim which relates to the stowage of steel beams.

Again, he contends that the stowage was improper because the ship's crew, with the knowledge of and at the direction of the ship's officers, according to the plaintiff, removed the lashings prior to the commencement of the unloading operation thereby rendering the working area not reasonably safe and that their doing so constitued negligence. The plaintiff contends that the defendant's officers knew of the condition of improper stowage since they had directed the removal of the lashings and chocks, according to the plaintiff.

The defendant relies basically upon the same evidence as in the case of the unseaworthiness claim to defeat the negligence claim, and the defendant rebuts the

gt 56

improper stowage aspect by pointing to the evidence of Captain Hansen that the braces or chocks had not been removed.

Without further detailing matters, the ship owner denies the improper stowage, denies that the chocks were removed, denies that it was negligent and contends that it acted as any reasonable prudent person would have acted under all the circumstances.

And the ship owner says, as it does under the unseaworthiness theory, that even if you should find that the ship owner was negligent, plaintiff himself contributed to the occurrence by his own negligent conduct and that any verdict should be reduced accordingly.

And, of course, it goes without saying that if you should find that the accident was due solely to the plaintiff's own conduct, then his claim under any theory must fail.

Again, the fact that the accident occurred or that the plaintiff was injured does not in and of itself establish the charge of negligence. The plaintiff has the burden of proving by a fair preponderance of the evidence that the defendant ship owner was negligent.

If upon all the evidence you find that the plaintiff has sustained his burden and that defendant's

gt 57

negligence, in whole or in part, caused or contributed to the accident, then he is entitled to recover for resulting damages.

On the other hand, if the plaintiff has failed to sustain his burden, then, of course, the defendant ship owner is entitled to a verdict.

Now about the witnesses and the credibility of witnesses.

You have heard the witnesses and you are called upon to pass upon their credibility and decide the fact issues by all the evidence before you.

How do you determine which witnesses are telling the truth when there are conflicts? Of course, you use your ordinary sense, which you do not by any means leave behind when you come to the court house and when you go to the jury room.

You saw the witnesses on the stand. How did their manner impress you? Were they frank, open, truthful, candid? So you size each one up, drawing upon your every day experience in business and social life.

You may also consider, of course, the relationship of a witness to the case and his interest, if any, in the outcome of the case.

The plaintiff, Mr. Lopez, is an interested

gt 58

witness and you may consider his brother-in-law, Mr. Gomez, also an interested witness, and there may be others.

An interested witness is not necessarily unworthy of belief. The factor of interest is just a factor among others to be considered by you in deciding what weight you will give the testimony, and you members of the jury solely determine what weight you give such testimony.

Another principle which is followed in determining the credibility of witnesses is that if you find that any witness testified falsely as to any material fact, you can either reject all of his testimony or you can accept it in part or wholly as you find it credible and believable.

Also I should say that the experts, such as the medical doctor and Captain Ash, again, the weight of the testimony of these experts is entirely up to you. They are to be treated just like any other witnesses. You judge their credibility as in the case of other witnesses. You ask yourselves whether their judgment on professional matters carry weight, is convincing. Are you satisfied that they gave you fair and accurate opinions? If you are, you act accordingly.

I believe, as I said before, if the accident

gt 59

resulted from the sole fault and the sole negligence of the plaintiff, he may not recover.

Now, members of the jury, I am about to give you instructions on the question of damages, but you must understand that because I do give you instructions on the issue of damages it does not mean that the Court has any view as to how you ought to decide the case. The question of damages is covered in these instructions solely that my instructions may be complete in the event that you reach the point of considering damages.

If you get to the point of considering damages, bear in mind that the purpose of the law is to award just and reasonable compensation for the loss caused by conduct which imposes liability.

There is no way by which you can determine with mathematical certainty or precision in a case like this what the damages are. You simply have to do the best you can on such an issue, bearing in mind that damages should be neither inadequate nor excessive, but they should be reasonable and purely by way of compensation. That is, there is no element of punishment involved in fixing damages, it is purely by way of compensation for pain and suffering and for money loss.

There are three elements or items which you

gt 60

may properly consider in determining damages, if you get to that point:

The first item is pain and suffering, past and future.

The second item is loss of earnings, past and future.

And the third item is medical expenses, past and future.

As to pain and suffering, not much more can be said than that the amount should reasonably compensate the plaintiff for the pain and suffering in the past and for the future, if you find that in the future he will suffer pain.

As to loss of earnings, if you find that the plaintiff is entitled to a verdict, then you should include two elements for lost earnings. By elements I refer to time periods.

First, the reasonable value of the time lost from the time of injury to today because of the plaintiff's inability to pursue his occupation as a longshoreman as a proximate result of the injury, and in determining that amount you may properly consider evidence of his earning capacity, the manner in which he occupied his time before the injury and what he was reasonably certain to have earned during

gt 61

the time lost had he not been disabled. And that refers to the time period down to today.

The second element is such sum as will compensate the plaintiff reasonably for any loss of future earning power occasioned by the injury and from which he is reasonably certain to suffer in the future. In fixing this amount, you should likewise consider what his health, physical ability and earning power were before the accident and what they are now; the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, all to the end of determining the effect, if any, of his injury on future earning capacity and, as I will explain in a moment, the present value of the loss so suffered.

The theory of the plaintiff as to damages for past and future loss of earnings is that he has not been able to work from the date of the accident, October 21, 1968, to the present, and will not be able to return to work in the future.

Taking first the plaintiff's claim for past wages, he may recover if you find that he is so entitled the sum of wages lost from the date of the accident to the present.

As to the amount of earnings, I give you the

gt 62

following information to aid you in computing plaintiff's lost wages:

His wages in 1965 were $9,598.

His wages for 1966 were $10,161.

His wages for 1967 were $10,316.

And from the beginning of 1968 until October 21, 1968, the date of the accident, he had earned $10,247.

Now for the plaintiff's claim as to lost future wages:

It is agreed by counsel for all parties that according to standard tables and ordinary experience, the normal life expectancy of a man 52 years old, as Mr. Lopez was at the time of the accident, would be 21 and 3/10th years, and his normal work expectancy life as a longshoreman would be 13 years.

You may consider this if you decide that the plaintiff is entitled to a verdict, but you are not bound by it.

If, members of the jury, you reach the question of damages and if you consider loss of future earnings and if you reach an amount made up of the aggregate of the amounts which you find the plaintiff will loss in the future during his work expectancy or life expectancy, you have not completed your task, because those amounts would all be payable over periods of time in the future and you must

gt 63

then reduce the aggregate of those amounts to the present, what is sometimes called the commuted value. And the reason is, as you will appreciate, if somebody owes you a sum of money payable over a number of years in installments and that somebody pays you now all at once, a lump sum, a smaller sum than the total of future installments, you can invest the smaller sum and by a combination of principal and interest recover the same amount from the smaller sum as the total of the future installments.

In calculating the present value of future money installments, you should use such discount rate as reasonable and prudent persons, without financial experience, would use so as to yield the total amount over the period of time involved.

The third item of damages is medical expenses, past and future.

You may award the reasonable value of such expenses already incurred. There is no evidence of what the plaintiff, Mr. Lopez, has incurred by way of medical expenses to date, but it is agreed that medical expenses necessarily incurred as of April 9, 1975 total $43,912.62, and are continuing.

You have heard that these expenses have been

gt 64

paid by Mr. Lopez' employer. However, for the purpose of any award of damages, these expenses should be treated as paid by and owed by the plaintiff, Mr. Lopez, himself.

You may award not only the reasonable value of medical expenses already incurred, but also such amount for medical expenses as you find is likely to be incurred in the future in respect of the injuries suffered by the plaintiff, Mr. Lopez, from the accident here in suit.

If you, in your consideration of damages, have reached this point, you have still not quite completed your task, because while there is no defense available to the ship owner of any assumtion of risk by the plaintiff, still the plaintiff, Mr. Lopez, was under a duty to exercise reasonable care for his own safety. And if you find that the accident was contributed to in part by the plaintiff's own conduct, this does not bar or defeat recovery by the plaintiff, but to the degree or extent to which the plaintiff contributed to the injury, there should be a proportionate reduction in the damages.

The members of the jury will understand that I am here taking a case not where you may have found that the plaintiff's own fault or own negligence was the sole cause of the injury. In that event, as I have told you before, the plaintiff may not recover. But if the negligence

gt 65

of the plaintiff contributed along with unseaworthiness or negligence, or both, to cause the injury, then to the degree or extent to which the plaintiff contributed to the injury, the damages must be reduced.

Some of you may have had experience either as jurors or otherwise in the state courts where, at least for a time, there was a rule that contributory negligence bars recovery. That, as I have said, is not the rule applied in this court in this type of case.

This type of case is governed by entirely different principles. The principle to which I am now directing your attention is known as comparative negligence.

To give an example, if you should find that the injury was caused, let us say, fifty percent -- and I am just using that as an example only, I am using arbitrary figures having no relationship to the facts of this case -- but, for example, suppose you find that the accident was caused fifty percent by the plaintiff's own conduct, then the amount of damages must be reduced by fifty percent.

Similarly, any other percentage which you find is the measure by which plaintiff contributed to his own injuries should be applied to reduce the amount of damages.

On this issue, that is, the negligence of the

gt 66

plaintiff, the burden of proof is on the defendant ship owner.

Members of the jury, we are near the end of my instructions.

Of course, in deciding the issues you should not be concerned, and I am sure you will not be concerned, about who is the plaintiff or who is the defendant. All litigants stand equal in this room. All litigants stand equal before the bar of justice. All litigants stand equal before you, the jury.

Your duty is to decide between these parties fairly and impartially to see that justice is done, all in accordance with your oaths as jurors.

It is your duty to discuss the evidence. Each juror is entitled to his or her own opinion, but you should exchange views with the other jurors.

To return a verdict, your verdict must be unanimous.

In this case we are asking the jury to return what is called a special verdict, which means that you are given certain questions to answer.

I will read these to you now and will give the questions in writing to Mr. Foreman.

This is the special verdict:

gt 67

1. Do you find that the plaintiff has established his claim of unseaworthiness?

Answer, yes or no, and there is a space for the foreman to write the answer yes or no in the space provided.

If your answer to the foregoing is yes, was such unseaworthiness due (a) to improper stowage? Answer yes or no. There is a space provided for the foreman to write yes or no.

By improper stowage I mean, of course, to include and refer to the issue I mentioned as to whether or not the steel beams, one of which fell on the plaintiff's leg, were or were not safely chocked at the time of the accident. That, of course, was an issue, as you know, between the parties. But that is included in the expression "improper stowage."

(b) to improper unloading? Answer yes or no, and there is a space provided for you to write yes or no.

2. Do you find that the plaintiff established his claim of negligence on the part of the ship owner? Answer yes or no and there is a space provided for the foreman to answer yes or no.

3. If you find that plaintiff is entitled to

gt 68

recover either for unseaworthiness or negligence of the ship owner, or both:

(a) What is the money damage to date? Answer dollars and there is a place for the foreman to write the dollar amount, if you get to this point.

(b) What is the future money damage reduced to present worth? Answer dollars and a blank for you to indicate future money damages.

(c) What is the total damage, amount (a) plus (b), which is a matter of simple arithmatic. Then answer dollars for the foreman to indicate.

And the last question, the fourth question:

If you find that plaintiff is entitled to a verdict, did the defendant sustain his burden that plaintiff contributed to the accident? Answer yes or no and a space for the foreman to indicate.

If the answer is yes, what percentage? Then there is a percentage figure for you to indicate.

Mr. Clerk, will you give this to the foreman.

Members of the jury, if during your deliberations you wish to see any of the exhibits, Mr. Foreman should send a note by the marshal and we will send in the exhibits requested to you.

If during your deliberations you wish any of

gt 69

the testimony read, likewise, Mr. Foreman should send a note by the marshal and arrangements will be made.

Now we come to that part of the trial when we must excuse our alternate juror, the one alternate juror remaining.

You will appreciate, Madam, from what you have seen this morning that having alternate jurors is highly important and oft times avoids the expense and inconvenience of retrying the case.

You have served with our thanks as fully as if you were a member of the jury and participating, and now we will excuse you and you may take your things from the jury room so that you can be out when the jury retires to deliberate.

Thank you very much.

(Alternate juror excused.)

THE COURT: Mr. Foreman and members of the jury, I ask your patience for a few moments longer. I would like to see counsel and the reporter here at the side bar, and I will ask you to remain patiently and without speaking to each other and we will resume in just a moment and submit the case to you.

May I see counsel, please.

gt 74

THE COURT: I think I will let my charge stand on that.

Anything else, Mr. Cohen?

MR. COHEN: Yes.

I would like to take exception to your Honor's failure to charge Nos. 6, 8 and 12 of the defendant's requests to charge.

I would also ask your Honor, in conjunction with the charge, that this must be a unanimous verdict, that there --

THE COURT: I told them that.

MR. COHEN: Yes. But in conjunction with that, your Honor, I ask that their verdict must be unanimous on each of the questions in the special verdict.

THE COURT: Incidently, I just followed along blindly in the path that I have used in the past, but are we still taking or insisting on unanimous verdicts in civil cases?

MR. COHEN: Yes.

MR. BLANC: Yes, your Honor.

THE COURT: We change the rule so often I didn't know.

That being so, I think the answer to each question must be unanimous.

gt 74

MR. COHEN: Yes.

THE COURT: What else?

MR. COHEN: That's all.

THE COURT: Mr. Cichanowicz?

MR. CICHANOWICZ: Your Honor, I join in Mr. Cohen's exception to the charge, failure to charge in accordance with requests 6, 8 and 12.

In connection with the charge on unseaworthiness in which your Honor, according to the way I wrote it down, your Honor charged that if the negligence results in a condition of unseaworthiness at the time of the accident and the accident results, the vessel is unseaworthy.

THE COURT: That was in when I was talking about operational negligence?

MR. CICHANOWICZ: Yes.

THE COURT: That is something I must have borrowed from Judge Weinfeld and that's what our struggles with the Usner case is.

You can note your exception. There is not much I can do about it. It is a terribly hard job.

MR. CICHANOWICZ: I mean, it is my understanding if the act is in progress and an unseaworthy condition results, that doesn't render the vessel unseaworthy. But if as a result a condition then exists and subsequently something happens, that is when that unseaworthiness may

gt 75

become a proximate cause.

It means you have to stop between.

THE COURT: You may be right, but I have struggled as hard as I could and I can't do any better with it.

It is a hard thing to deal with. Couldn't you agree?

MR. CICHANOWICZ: Yes, sir.

THE COURT: All right. Anything else?

MR. KLONSKY: Your Honor, maybe to satisfy Mr. Cohen's objection, could we have a special question as to what the future medical expenses would be so if it is to be excised by the Court of Appeals on the basis of his contention we still have the balance of the verdict?

I didn't think any one would object to that. I only asked for $25,000, but if he makes an issue of it, I wouldn't like that to be the cause of a disruption of a verdict if we get it.

THE COURT: You mean that there is no proof as to what it is?

MR. KLONSKY: That's what he says. I think there is proof of the fact that he obviously is in need of it. He has this condition now which was seen by the jury.

gt 76

THE COURT: That was my theory, that they could conclude from the testimony of the doctor either that he would be required to have further treatment or operations because of the continuing pus condition or, as alternate juror number one, now the foreman, was about to ask in this question, might lose the leg, might have to have it amputated.

MR. KLONSKY: You can't project the future with any known means presently.

I couldn't tell you how many days he will spend in a hospital, how many doctors he is going to see inthe future, but he is entitled to future medical expenses even though he can't compute it accurately.

That's why pain and suffering can't be computed accurately, but it is still an item of damage.

MR. COHEN: He is talking now as to his failure of proof. His doctor didn't say there were other operations required or how much they might possibly cost.

THE COURT: I don't want to tinker at this late date with the questions. I just trust my ability to do it competently.

All right.

(In open court)

THE COURT: Members of the jury, I find that I

gt 77

made at least one mistake during my instructions. I inadvertently referred to Mr. Gomez as the brother-in-law of the plaintiff Mr. Lopez.

Gomez, you remember, was the signal man, and he was not, is not the brother-in-law. It was Scerencses, or something like that, a longshoreman who was in the hold with Mr. Lopez, who is his brother-in-law.

Also when I spoke of interested witnesses I didn't mention Captain Hansen as an interested witness, but you might or might not consider him an interested witness. I express no opinion as to whether he was or he wasn't.

And also you have not the form of the questions. I did tell you that your verdict must be unanimous. Of course, that means that your answers to each question must be unanimous.

All right. Mr. Clerk, will you swear the marshal.

(A marshal was duly sworn.)

THE COURT: Now the case is being submitted to you, the jury. The questions on the special verdict form should be answered.

When you have reached a verdict by answering these questions, tell the marshal, and then in open court

-2/9/76 pm gtme -1

(At 2:30 a note was received from the jury.)

THE COURT: We have a note from the jury which says: "Evidence required: Deck plan of ship."

MR. KLONSKY: There it is.

THE COURT: What is that?

MR. KLONSKY: Plaintiff's Exhibit 2.

THE COURT: All right, may I have it.

(Pause)

THE COURT: Is it agreed that Plaintiff's Exhibit 2 is the deck plan of the ship?

MR. KLONSKY: Yes, your Honor.

MR. CICHANOWICZ: Yes.

MR. BLANC: Yes, your Honor.

THE COURT: The next item says: "Stowage plan, No. 1 hold."

MR. KLONSKY: Here it is. That is Exhibit 1 in evidence.

THE COURT: All right, show it to the defendants.

MR. CICHANOWICZ: Yes.

THE COURT: Is it agreed that the stowage plan is Exhibit 1?

MR. BLANC: Yes, your Honor.

MR. COHEN: Yes.

MR. CICHANOWICZ: Yes.

gtme-2

THE COURT: Then it says: "Photographs of No. 1 hold before and after."

MR. KLONSKY: We have the small ones, too. Here are the small ones.

MR. CICHANOWICZ: Do you have all three?

MR. KLONSKY: Two small ones and three large ones.

MR. CICHANOWICZ: No, three of each.

MR. KLONSKY: Oh, yes, here is the third one. (Handing)

THE COURT: May I see what we have here.

(Documents handed to Court.)

THE COURT: I have been given Oldendorf's Exhibit 3, Oldendorf's Exhibit C, Oldendorf's Exhibit D and Oldendorf's Exhibit D-1, C-1 and E-1.

Are there any other photographs?

MR. KLONSKY: No, not of the No. 1 hold.

MR. CICHANOWICZ: Not of the hatch.

THE COURT: Then, Mr. Clerk, will you give the Marshal for the jury Exhibits 1, 2, Oldendorf's C, Oldendorf's D, Oldendorf's E, Oldendorf's C-1, D-1 and E-1.

(Documents handed to Marshal)

THE COURT: Mr. Clerk, will you mark this note from the jury as a Court's Exhibit, please.

gtme-3

(Court's Exhibit No. 1 marked for identification.)

xxx

MR. COHEN: Your Honor, at 4:15 this afternoon I have a conference before Judge Owen in Room 1506.

May I, if we have not had a verdict by that time, be excused to go down there, and if I am needed up here, if a note or a verdict should come in, would your Honor have the Clerk call me down there?

THE COURT: Yes.

(Recess)

(At 3:00 o'clock p.m. a note was received from the jury.)

(In open court in the absence of the jury.)

THE COURT: Now we have another note from the jury. The note reads: "Jury requests that part of Judge's Charge with regard to the ship owner's responsibilities, in particular the unloading."

I thought that I would answer that question by giving them my charge on unseaworthiness, because I don't think that this encompasses negligence.

Mr. Clerk, would you get the jury.

(Jury present.)

THE COURT: Members of the Jury, we have your last note, which reads:

"Jury request that part of the Judge's Charge

gtme-4

with regard to the shipowner's responsibilities, in particular the unloading."

In my view, this is a perfectly sensible request, and as I repeat my instructions, I am well aware they are they are not as clear as I'd like them to be, and I can only say that the state of the law in this area is itself very imprecise, and judges as well as juries have to do the best we can with the law that has been made for us, of course, in the last instance by the Supreme Court.

So, you mustn't be in any way discouraged if you think that it is not an easy subject to grasp, because judges and lawyers have had the same difficulty for a long time.

With that introduction, I am going to look at my notes and attempt to review and give you again my instructions in the respect in which we think you have asked for them.

It is an ancient law of the sea which imposes upon the owner of a ship the duty to supply the crew with a seaworthy vessel, which means one reasonably fit for its intended purpose or use, that is, a ship reasonably adequate for crew members to discharge their function. And that duty of a shipowner extends to all parts of a ship - holds, equipment, working areas used by the crew in the discharge

gtme-5

of their duties.

The duty requires proper stowage and proper methods of unloading and equipment for such purpose, such as lashing, chocking, dunnage and the like, must measure up to the required standard.

When the shipowner gives over control of the ship to an independent stevedore such as ITO, this did not relieve the shipowner of his absolute duty to supply a seaworthy vessel. That duty extended both to the working area and to all equipment used aboard the vessel.

A ship owner is not relieved of his obligation to supply a seaworthy vessel by the fact that equipment, or some of it, which is used in the work is to be supplied and is supplied by the stevedore. The shipowner's duty to provide a seaworthy vessel to Lopez was entirely independent of and separate from whatever duty, if any, may have been owed to Lopez by his employer, ITO.

The shipowner's duty to supply a seaworthy vessel is absolute, and if he fails in that duty, that is, if the ship, its working areas, its stowage or the method of unloading, are not reasonably fit for intended use so that the working areas are not reasonably safe for the men at work, and if as a proximate result a longshireman doing a crew member's work, as in this instance, is injured, then

the shipowner is liable for the resulting damages.

Under the doctrine of unseaworthiness, this absolute liability is imposed even though the shipowner may have been free from fault and whether or not the officers of the ship knew of the defective or unseaworthy condition.

The method of unloading cargo or the manner of stowage of the cargo may itself contribute to create an unseaworthy condition. The shipowner's duty as to a seaworthy vessel is a continuing one and is non-delegable, that is, it can not be passed on to another person, nor does liability for an unseaworthy condition depend upon negligence, fault or blame.

It is the fact of unseaworthiness, if you do so find, which renders the shipowner liable if as a proximate result a seaman or longshoreman sustains injuries.

When I say that the shipowner has an absolute duty to furnish a seaworthy vessel, this does not mean that the owner was required to furnish an accident-free ship. In deciding whether a vessel is seaworthy, the standard is not absolute perfection, but reasonable fitness.

In short, the duty is to supply a vessel and equipment reasonably fit for their intended use.

Then I attempted to point out the differences

gtesb-1

between an isolated act of negligence by some third party, such as a fellow longshoreman or the crane operator, which I described as operational negligence, and negligence of that sort which had continued for such a period as to constitute a condition which you could find was the same as unseaworthiness.

I said that the law distinguishes between a condition and an act which might or might not bring about a condition of unseaworthiness.

And this is the distinction which I said had been considered metaphysical and hairsplitting, and in the decided cases, it is a distinction which is somewhat difficult to explain but I am attempting to simplify for you because you are called upon to make the determination whether this ship, including possible acts of negligence by others, was, in fact, unseaworthy.

If the condition of unseaworthiness exists, whether it was brought into existence by the ship's crew or by a third party or a fellow employee of the longshoreman plaintiff, the shipowner would still be liable if there was a condition of unseaworthiness.

Then I supposed or took as an example a seaworthy vessel and equipment reasonably fit for the intended use of that equipment and I supposed unloading

gtesb-2

operations to be in progress.

Then I asked us to suppose that in the course of the unloading operations there was the negligent act of some person not a part of the ship's crew.

In such an instance, if the negligent act is still in progress and has not ripened into an unseaworthy condition, then the act, the negligent act, in this case possibly the stevedore or Hoffman, the crane operator, is referred to as operational negligence, and in that circumstance, the shipowner would not be liable because, as we have seen, the negligent act is still in progress and has not yet ripened into an unseaworthy condition.

In such a case, the defect arose as a momentary step or a phase in the progress of the work and was an isolated incident in the continuous course of operation and an unseaworthy condition had not yet resulted and the shipowner would not be liable.

On the other hand, if this act of negligence or momentary phase had ended and the act had ripened into a condition of unseaworthiness at the time the accident occurred, then, because at that time the ship was unseaworthy, the shipowner would be responsible.

This means that there is a point at which negligent conduct ends and an unseaworthy condition begins.

gtesb-3

And if the act, that is, the negligent act, in this case of the stevedore or of the crane operator or Hoffman, or both, results in a condition of unseaworthiness at the time of the accident, then the shipowner is liable.

But if the negligent act falls short of creating the condition at the time of the accident, that is, remained an isolated or momentary phase of operational negligence, then the shipowner is not liable.

As I said at the beginning, I wish I could be more specific, but I am afraid that these general principles are the answer to your question. And so I suggest you retire and resume your deliberations.

Thank you very much.

(At 3:30 p.m., the jury returned to the jury room to continue to deliberate upon a verdict.)

MR. KLONSKY: Your Honor, may I be heard?

THE COURT: Of course.

Mr. Clerk, will you mark this as the next Court's exhibit.

(Court Exhibit 2 was marked for identification.)

MR. KLONSKY: Your Honor, I think the theory, the presentation by the plaintiff, of how the unseaworthiness is involved was not expressed by your Honor towards the end of your discussion with the jury.

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Benito Lopez

v 69 Civ. 1755

EGAN OLDENDORFF

(Trial resumed)

February 10, 1976

(In open court in the absence of the jury.)

MR. CICHANOWICZ: Your Honor, we asked for this opportunity to take further exception to the Court's charge and the recharge of the jury, particularly, the use of the words "metaphysical distinction" between negligence and unseaworthiness.

I think there is actually no distinction.

THE COURT: Between negligence and--

MR. CICHANOWICZ: In defining the Usner theory, your Honor used the words "metaphysical distinction," which, as I understand it on reflection, means there is actually no distinction.

THE COURT: I think that is another word I borrowed from Judge Weinfeld. But never mind, I adopted it and am responsible for it still.

MR. CICHANOWICZ: I think the other reference that your Honor made to the fact that lawyers and attorneys have difficulty in understanding this distinction--I think that that rather puts the jury in a situation where they

gt me 2

may have some doubts in their minds as to what the law is.

THE COURT: But isn't it so?

MR. COHEN: No.

MR. CICHANOWICZ: No.

MR. COHEN: May I join in Mr. Cichanowicz's objection.

THE COURT: Of course. You are perfectly free to make the record.

MR. COHEN: I would like to join in Mr. Cichanowicz's statement and the exception and perhaps try and amplify his thought, because it disturbs me, too, the more I reflected upon your Honor's charge.

The defense in this case has been a very simple one, namely, that the accident was caused purely and simply because the crane operator improperly topped the boom of the crane without having received a signal to do so, and that that set in chain all the events that occurred, the draft swinging, striking the beam which ended up on plaintiff's leg.

The plaintiff's theory was that there was some condition of unseaworthiness preexisting in that hatch upon which such a negligent act by the crane operator acted.

It really is irrelevant to the plaintiff's case

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what triggered any unseaworthy condition, whether it was a negligent or non-negligent act. The plaintiff wins his case if he establishes that there was an unseaworthy condition which was a contributing cause of the accident.

His theory has been that the stowage of those beams, the removing of the lashings and the chocks, constituted such an unseaworthy condition. He would win his case merely by having the jury find that there was such a condition which caused the accident.

The defense, on the other hand, has said there was no such condition, the accident was caused purely and simply by the negligence of the crane operator.

That is the basic distinction under the circumstances of this case between unseaworthiness and operational negligence.

We fear that when your Honor said in his charge and recharge that the distinction between unseaworthiness and operational negligence is a metaphysical one which even judges and lawyers have trouble with sometimes don't understand, you really, I submit, took away the defense in this case. You are telling the jury that, in effect, there is no real distinction and, therefore, they could find, contrary to the decision in Usner, that the negligence of the crane operator could be considered by them as an

gt me 4

unseaworthy condition of the vessel in and of itself, and that is contrary to the law. It has been contrary to the defense's position in this case, and we are fearful that in using that language your Honor did gravely jeopardize the defense.

We wanted to call this to your Honor's attention as soon as we could in the hope that if your Honor agreed with us some corrective action might still be taken with this jury.

THE COURT: I am certainly not going to add to the jury's confusion by giving them any further instructions.

Since I will be trying these cases, I would like to know myself what is involved.

According to Mr. Klonsky, Usner left the preexisting law intact. He cites me all the time. He says that Justice Stewart says we are not changing the preexisting law.

He also says that operational negligence can still produce unseaworthiness, and I am inclined to agree with him if it passes an isolated incident of unseaworthiness.

MR. COHEN: Right.

THE COURT: Excuse me. Of negligence.

It seems to me that I left the jury the option of saying that if they found that there was negligence

gt me 5

of the crane operator and that that was an isolated instance of negligence, that the ship was not made unseaworthy thereby.

MR. COHEN: A plaintiff recovers, your Honor, not because an unseaworthy condition was caused by an act of operational negligence; a plaintiff recovers merely by showing an unseaworthy condition, regardless of how it is caused, which unseaworthy condition was a contributing cause of the accident.

So, it is not part of the plaintiff's case, really, to have to show how the unseaworthy condition came into being.

In the context of this case where we are dealing with a draft, the first draft being taken out that morning, which suddenly swings from the offshore side to the inshore side, with the only explanation in the plaintiff's own case being that of the signal man who says that the crane operator improperly lifted his boom "when all I did was tell him to raise up on the draft..."-that is the only explanation given in his case-- if that be what this jury should believe caused the accident, then I think they should be instructed that as a matter of law in that situation they should find for the defendant, because that is a clear act and a simple act of operational negligence for which

gt me 6

this ship can not be liable.

What your Honor said before is true theoretically and might apply in another case. Something could be done on a Monday that leaves a condition existing and on a Tuesday somebody gets hurt by it. The fact that it was done on a Monday negligently or non-negligently is unimportant. If on Tuesday there is an unseaworthy condition, that's what counts.

In this case we don't have that kind of a situation, and giving a charge, I think, that embraces that theoretical possibility to the circumstances of this case really injures the defense, because this is not that kind of a case that your Honor, you know, was theoretically discussing.

We don't have that kind of passage of time or anything else. We have a simple instantaneous act, according to the plaintiff's own proof, and, therefore, we really shouldn't have this jury concerned with, I think, becase I can see--they shouldn't be concerned with that passage of time of the ripening. They may take that to understand--and I think if they did it would be highly improper and wrong--to undertstand that if the swinging draft would have hit the plaintiff himself, that would be operational negligence, but if it hits the beam which then

gt me 7

hits the plaintiff, that might be what your Honor has in mind when your Honor talked about ripening into unseaworthiness, and that really is not a legal distinction in this case.

I think that this case--I am getting repetitious and I don't mean to be. But this case really has a simple, sharp, factual issue. In my judgment, if there was a bad stow--

THE COURT: Excuse me, Mr. Cohen.

The trouble is the jury could find that taking away the chocks--I notice there is an issue of fact there, but suppose they were to believe the plaintiff's witnesses and find that the chocks were taken away, and suppose they found that that itself created an unseaworthy condition, relying on relying on Ash's testimony that that made the beams liable to fall down, if in that circumstance one of the beams does fall down, whether it's a roll of the vessel or any other reason, and the plaintiff is injured, he should have a verdict.

MR. COHEN: Absolutely right. I couldn't agree with you more.

THE COURT: So, I didn't feel I could direct a verdict for the defendant.

MR. COHEN: That is not what I am suggesting.

What I am concerned with is the converse of that situation.

If the jury should not believe that the chocks were removed or if they should not find that the ship was unseaworthy because of the condition of the cargo stow, they then have to consider, under your Honor's interrogatory and under the charge, the cause of the accident. And the defense here has been saying that the accident was caused by a simple act of negligence on the part of the crane operator which we think brings this case under the Usner doctrine, if the jury should so find.

But what we are fearful has happened is that in the course of this charge the jury has been led to believe that that is a metaphysical distinction which really means no distinction and that the ship can be found liable under the law for unseaworthiness even if the sole cause of the accident was this single negligent act of the crane operator.

That is where we think the charge may lead the jury astray to the defendants' prejudice.

THE COURT: Mr. Cohen, as one lawyer to another, I must say that I am not terribly happy with the charge, but it is just the best that I can do under the circumstances, and you fellows are experts in this field, I'm not, and I

gt me 9

think the judges have contrived between them all to make a mess of it.

I am glad to have your views and I am by no means rejecting them, but as I say, I am not going to change my charge.

Mr. Klonsky, do you want to educate me further?

I am not going to change the charge, but I am anxious. I can't avoid error at this stage in this case, if I have committed it, but maybe in the future--

MR. KLONSKY: Your Honor, you have made an excellent charge, except where I excepted.

Very simply stated, we do not have an Usner situation here. It is not a single isolated, unexpected act from beyond by someone who is not related to the operation or unrelated as a winch operator.

We have a condition which in the Amadore case was called operational unseaworthiness, which was the nature of the stow after the chock was removed and that was a dangerous situation which was brought into play by the movement of the draft.

Whether the movement of the draft was negligent or not negligent on the part of the crane operator, is immaterial, it came upon something which constituted a danger and that ripened into unseaworthiness, and that is

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what the Crumady case has held, the Grillea case.

In Grillea it was only a few seconds puting down the hatch cover with the wrong pad eye underneath and the man stepping on it and the man being precipitated into the hold, just a few seconds.

THE COURT: Yes.

But as you tell me this, I can see that the defendants have some point, because they say all well and good, if you win on that theory they are prepared to take their lumps. But they say that it is conceivable under my charge that the jury might find that the beams were properly stowed so that there was no unseaworthy condition before the negligence of the crane operator.

What they are saying is that it is conceivable that the jury might find unseaworthiness even so from the --

MR. KLONSKY: The mere movement of the draft?

THE COURT: -- from the movement of the draft with my charge that there is a point at which negligence ends and unseaworthiness begins.

MR. KLONSKY: You very carefully --

THE COURT: I think that is the basis for it, and I say they have a point.

MR. KLONSKY: You pointed out to them --

MR. BLANC: That is correct, your Honor, and for that reason Hoffman joins in the request of Oldendorff and ITO for a further charge.

MR. KLONSKY: Your Honor, I do recall you charging them that if it was a single isolated incident that they could find for the defendant. You said that more than once.

THE COURT: I did.

MR. KLONSKY: And I think that --

THE COURT: And on the defendants' theory, which I assumed they included in their summation, the jury could find that.

MR. KLONSKY: But what about the tag lines? That doesn't require anything with the stow, that requires a situation where inadequate equipment was furnished or an inadequate means was taken for the discharge.

THE COURT: Yes, yes.

I think you have protected yourselves against my error.

MR. BLANC: Yes, your Honor.

I just wanted to make certain that I had formally excepted.

THE COURT: Yes, of course.

accident so that there is no evidence on which the jury can find that he has lost earnings solely because of this accident from October 21, 1968 to date.

There is also no evidence as to the availability of any job today or in the future to the plaintiff based on his experience as a longshoreman.

It seems in that state of the record, the jury is being asked to speculate as to loss of earnings to date and in the future.

MR. COHEN: I would like to join in Mr. Blanc's exception and further except by reason of your Honor's failure to charge the jury that it is the plaintiff's burden to prove the items of damage that he claims.

MR. CICHANOWICZ: Your Honor, I join with Mr. Blanc and Mr. Cohen in the exception.

THE COURT: All right.

(At 3:30 p.m., in open court in the absence of the jury.)

THE COURT: We have a note from the jury. It reads, "The jury has finished deliberation and has arrived at a unanimous decision on all questions," but it doesn tell what the decision is.

Mr. Clerk, will you mark the jury's note as the next Court's exhibit.

(Court Exhibit No. 4 was marked.)

THE COURT: Mr. Klonsky, amy I give you back your material that you gave me, your article and the note from the Law Week (handing.)

Thank you very much.

Mr. Clerk, will you get the jury, please.

(Jury present.)

THE COURT: Mr. Clerk, will you take the jury's verdict, please.

(Jury role called; all present.)

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, they have.

THE CLERK: As to question 1, do you find that the plaintiff has established his claim of unseaworthiness?

THE FOREMAN: The answer is no.

THE CLERK: If your answer to the foregoing is yes, we go to question No. 2.

Do you find that the plaintiff established his claim of negligence on the part of the ship owner?

THE FOREMAN: The answer to that question is yes.

THE CLERK: Question No. 3:

If you find that plaintiff is entitled to

a recovery either for unseaworthiness or negligence of ship owner, or both, (a) what is the money damage to date?

THE FOREMAN: $240.000.

THE CLERK: (b) what is the future money damage reduced to present worth?

THE FOREMAN: $125,000.

THE CLERK: (c) what is the total damage amount?

THE FOREMAN: $365,000.

THE CLERK: 4. If you find that plaintiff is entitled to a verdict, did the defendant sustain its burden that plaintiff contributed to the accident?

THE FOREMAN: The answer to that is yes.

THE CLERK: If the answer is yes, what percentage?

THE FOREMAN: Fifteen percent.

THE COURT: All right, Mr. Clerk.

Would you poie the jury.

THE CLERK: Members of the jury, listen to your verdict as ti stands recorded.

Your answer to question No. 2 was yes.

Your answer to question No. 3(a) was $240,000.

Your answer to (b) was $125,000.

Your answer to (c) was $365,000.

Your answer to question No. 4 was yes.

And if the answer is yes, what percentage, it was fifteen percent.

(Each juror, upon being asked, "Is that your verdict?" answered in the affirmative.

THE COURT: Mr. Foreman, ladies, before excusing you with our thanks, I want to say just a few words.

First, I want to say what I do not alsways say, and that is that I think you have been most conscientious. YOu have come in here from the community and helped us in the administration of justice and we thank you for it.

You have been diligent, faithful, conscientious, and you should know that.

Then I want to say to you what I always say to jurors, and that is, first, I never comment as the presiding judge on the verdict of the jury. In civil or criminal cases, I never comment. So the fact that I make no comment is not to be taken to mean anything. I never comment.

Second, I conceive that in both civil and criminal cases, when the jury comes in from the community to help us, what occurs in the jury room is a matter of

9th 87

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THE COURT: I figure that this means that I should direct the clerk to enter a verdict against the ship owner for $310,250.

Does that --

MR. COHEN: That is the arithmetic, your Honor. 15 percent off the $365,000.

THE COURT: Then on the verdict of the jury as recorded in the minutes of the court, the clerk is directed to enter a judgment in favor of the plaintiff and against the ship owner, the defendant Oldendorf, for $310,250.

The first thing I think I ought to do is to entertain motions.

Mr. Klonsky, I assume you don't have any motion.

MR. KLONSKY: I do have a motion. It goes to the contributory negligence aspect as previously indicated.

I don't think there was any proof of it and there was a burden of proof on the defendants as to whether perhaps the plaintiff should have been closer inshore and aft.

I respectfully submit that there is no mention of it made by the defendants in their summations, that there was no proof of it whatsoever in the record and I respectfully ask that this be excised from the judgment and the full amount be given to the plaintiff.

gth 88

THE COURT: That motion is denied.

All right, Mr. Cichanowitcz.

MR. CICHANOWICZ: Your Honor, I think I would like to make my motion on written papers.

THE COURT: I beg your pardon?

MR. CICHANOWICZ: I would like to make my motion on written papers.

I do have ten days from the date of the entry of the judgment, which I assume will be --

THE COURT: I am not sure. It will be either today or tomorrow.

MR. CICHANOWICZ: Yes. I would prefer to do that.

THE COURT: All right. Where does that leave us about the claims over? That disposes of the claims over, doesn't it?

MR. CICHANOWICZ: No.

MR. COHEN: I think it does.

MR. CICHANOWICZ: No, it does not, definitely not.

MR. COHEN: I think that under the law, where a ship owner is not liable for the warranty of seaworthiness, which is a species of his liabilitywithout fault, he is not entitled to any concomitant warranty from any of the shoreside contractors who were working aboard the ship.

gth 89

In other words, it is only where the ship owner is liable for his warranty of seaworthiness that the courts have invoked this Ryan type of warranty of workmanlike service, and that was discussed at length in the Second Circuit in the case of Schwartz v. Compagne General. I don't have the citation offhand, for which I apologize, but I will get it to you tomorrow or I can include it in some papers.

MR. CICHANOWICZ: I disagree with Mr. Cohen. And I wish I could remember the name of the case. I believe it is a Supreme Court case. I can't recall the name.

In that case there was only a finding of negligence and the Supreme Court did send the case back because the judge had directed a verdict for retrial on the indemnity issue.

Concurrent negligence is not a bar to indemnity.

I have researched this issue. I have had this issue up in several other cases in this court, and indemnity has been allowed.

So merely because the jury finds that the ship owner was negligent and finds that the vessel was not unseaworthy does not automatically preclude the recovery of indemnity.

I think there is no question about it under the

gth 90

warranty of workmanlike service. As I say, concurrent negligence does not defeat recovery. So where are we? What are we talking about?

THE COURT: I think probably I better give you a chance to think about it, possibly deal with it at some time in the future.

My strong preference, of course, would be to try to dispose of the matter quickly, but I'd rather do it right than do it fast.

In some ways it is sort of a strange verdict.

MR. COHEN: It is almost inconsistent.

MR. CICHANOWICZ: I think it is an inconsistent verdict.

THE COURT: That does not make any difference. Juries are permitted to be --

MR. CICHANOWICZ: Not that inconsistent.

MR. COHEN: Only women are allowed to do that, with all apologies.

THE COURT: No, no, I think juries are permitted to do that, too.

It isn't inconsistent. It may seem strange to us, but I don't know that I can say that it is inconsistent.

MR. BLANC: While Mr. Cichanowicz is thinking, I would like to endorse Mr. Cohen's remarks and join in them

(661)

gth 91

and say that at this juncture I do not believe the ship's claim for indemnity can stand.

THE COURT: I would expect you to take that position, Mr. Blanc.

Initially, that has a certain appeal.

But there is no reason. The case has waited this long and it isn't hurting Mr. Klonsky or his client, because they will be getting interest either from today or tomorrow on the amount of the verdoct, and I will give it my attention as soon as possible. But I do urge you to get your papers in promptly, because these things pass out of my recollection and I wait to have to come back to it.

MR. CICHANOWICZ: Your Honor, may I suggest something?

Insofar as -- apparently what is troubling the Court at this moment is this question whether because of the finding of negligence and not any finding of unseaworthiness, whether or not there is a right to indemnity.

I think that what I would like to do is, with the Court's permission, submit those cases which deal with that particular problem so that you may give it your attention.

I could possibly do that tomorrow.

I would like to do it with this understanding, that

gth 96

be a bit of intricate reading but nonetheless this is where I think your Honor will end up after he reads those cases.

THE COURT: All right. Mr. Klonsky, that brings me back to your motion to amend your pleadings to state a direct claim against Hoffman.

I take it you don't press that.

MR. KLONSKY: I don't know how good the ship owner is for the judgment, whereas if I have an action against the crane operator and it is granted I have two people to collect from.

THE COURT: I think I will deny your motion to state a claim against the crane operator.

Had it been made earlier we could have tried it and taken an advisory verdict from the jury. Besides, I don't think that we ought to get into that now.

MR. KLONSKY: I may end up a ship owner myself.

THE COURT: I will dispose of that motion. I will deny the motion to state a direct claim against Hoffman.

That leaves us still with the claims over and the cross claims. I have already indicated I want to get rid of that just as soon as I can, so be governed accordingly.

MR. CICHANOWICZ: Needless to say, I don't

gth 96a

agree with what Mr. Cohen just said about what the law is.

THE COURT: I understand.

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to join on behalf of Hoffman.

THE COURT: All right. So far as I am concerned, you certainly may do so, and that motion is for the same reasons similarly denied.

MR. SCHWARTZ: There is an outstanding motion, I assume your Honor appreciates, on behalf of ITO to dismiss the third party complaint.

A motion was filed on a memorandum of law.

THE COURT: Let's see if I can find that.

Do we have any motion?

MR. SCHWARTZ: There was a meorandum filed, also.

THE COURT: I have here a memorandum of law. I have never seen a motion.

Do you have a motion?

MR. CICHANOWICZ: There was a notice of motion attached to the memorandum of law, your Honor.

MR. SCHWARTZ: It is dated February 12, 1976.

THE COURT: Will you take a look at this, Mr. Schwartz, and see if that is what you are talking about.

(Handing.)

MR. SCHWARTZ: This is the motion, your Honor.

(Pause.)

THE COURT: I have read this notice of motion and memorandum of law.

The memorandum of law succeeds admirably in discussing the problem thoroughly without once mentioning Rodriguez.

I think Rodriguez is controlling and the motion is denied.

MR. BLANC: On behalf of Hoffman, I would also like formally to join in the motion to dismiss the third party action.

THE COURT: All right. That is certainly permitted, and the motion on behalf of the crane operator is also denied.

MR. KLONSKY: Your Honor, I also wish to move for a removal of the 15 per cent contributory negligence and say that there is no proof of plaintiff's contributory negligence in this case.

THE COURT: All right. And that motion is also denied.

I have endorsed this paper, "The within motion is denied on the authority of Rodriguez against Olef Pedersen and so forth, Second Circuit, December 9, 1975. So ordered."

I have signed and dated it.

Mr. Clerk, will you see that this endorsed order is filed.

All right. Now are we ready to try such

to award counsel fees in any case, absent a statute, is the U. S. Supreme Court decision on May 12, 1975 in Alyeska Pipeline Service Company, versus Wilderness Society, 95 Supreme Court, 1612.

I respectfully urge upon your Honor that in the event that there is a recovery by the shipowner against ITO that --

THE COURT: That is ordained. Of course it will be. He is entitled to recovery as a matter of law.

MR. SCHWARTZ: And do I take it when your Honor cited Rodriguez that your Honor thereby intended to indicate that by virtue of the contributory negligence of the plaintiff, that becomes imputable to the stevedore employer and as a matter of law we are being held liable to the shipowner?

THE COURT: Because you breached your warranty to supply a non-negligent employee.

MR. SCHWARTZ: And that is the predicate of liability of ITO in this case?

THE COURT: I think Rodriguez requires me to.

MR. SCHWARTZ: Then if your Honor gets to the question of counsel fees for determination -- and I say that because it is conceivable that it may be stipulated as to the amount being reasonable and what amount is

any sense at all.

Let me take a moment.

(Pause.)

THE COURT: Yes, I think that this decision is correct and would indicate that the counterclaim of the stevedore against the shipowner has to be dismissed.

The stevedore in the case at Bar is being held liable to the shipowner because of the breach of the stevedores warranty and, therefore, it cannot recover as against the shipowner and the counterclaim must be dismissed and is dismissed.

All right. What next?

MR. KLONSKY: I think the direct action of the plaintiff against the Crane Company might be next.

THE COURT: All right.

MR. KLONSKY: I rest on the record already set forth with respect to the testimony about the crane operator.

THE COURT: All right.

Does Hoffman want to put in a case?

MR. BLANC: Yes, your Honor.

Preliminarily thereto, I would like to renew my motions to dismiss the direct action not only on the grounds stated hither to for laches, but also on the

ground that the Court has no jurisdiction of an action involving a New Jersey plaintiff and a New Jersey corporation, neither of whom are resident in this district and, therefore, have no right to any action here.

Plaintiff has no right to any action here.

THE COURT: I believe I must have looked this up at the time that I permitted the plaintiff to assert a direct claim against the crane operator Hoffman and I was satisfied that we did have jurisdiction, so the motion must be and is denied.

MR. BLANC: Mr. Lyons, will you take the stand, please.

MR. KLONSKY: Your Honor, may we have all witnesses exluded from the courtroom?

THE COURT: Yes.

If there are any persons who are supposed to be witnesses, we will ask them to go to the witness room.

Are there witnesses?

MR. BLANC: Your Honor, we have one fact witness and one expert. I request that the expert be allowed to remain.

MR. SCHWARTZ: I respectfully ask your Honor that if there is another fact witness that he be excluded at this time.

MR. KLONSKY: I suppose it is my turn then, your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. KLONSKY:

Q Mr. Spillane, did you give a written statement in this matter?

A No, sir.

Q Your name doesn't appear on any paper in this matter?

A I don't recall any.

Q When you brought the crane to the dock where this vessel was to be discharged, did you have any paper designating where you were to go and what you were to do?

A Yes, sir.

Q And have you seen that paper?

A I'm the one that signs it. Yes, sir.

Q Have you seen it recently?

A The last time I saw it, I believe, was in Mr. Blanc's office.

MR. KLONSKY: May I see it, please?

A That's the ticket slip?

Q Yes. Telling you where to go andfor what

purpose?

A Yes.

MR. BLANC: That is attached to ITO's answers to Hoffman's interrogatories.

MR. KLONSKY: He didn't see this recently. He couldn't have seen what was in the court's file.

What did he look at?

MR. BLANC: This is in our file.

MR. KLONSKY: He looked at something that I want to see.

MR. BLANC: I know. I am identifying it, if you will give me half a chance.

Attached to it is the Hoffman Rigging and Crane Service lease of the crane, which is the document to which Mr. Spillane refers (handing).

MR. KLONSKY: You don't have what he actually looked at, Mr. Blanc, what he testified he saw recently.

MR. BLANC: This is the copy of that piece of paper. I don't know that this is the identical piece. Obviously that is the court record.

MR. KLONSKY: You see, my problem is that I don't know whether this witness will agree with you as to what he saw.

MR. BLANC: Ask him.

Q I show you two pieces of paper photostated as one (handing).

Is this what you have reference to?

A Yes, sir.

MR. KLONSKY: May we have this marked in evidence, your Honor.

THE COURT: You can identify it. It is already a part of the court's file.

MR. KLONSKY: May I read this into the record in pertinent part?

THE COURT: Yes.

MR. KLONSKY: This is a photostat of two documents on one page, with the heading of "Hoffman Rigging and Crane Service, Inc."

On the left-hand side is the notation "Customer: ITO ; date, 10/21/68; address, Norton Lilly; day of week, Monday; ship, Jobst Oldendorff; crane No. 37; street, Berth No. 28; weather conditions, windy; city, state, Port Newark, New Jersey. Using 80-foot main boom."

It is signed by customer's name, Frank Albano, on 10/21/68.

"Tiem left for job, 6:30 a.m.; time left

job, 5:00 p.m.; time arrived on job, 8:00 a.m.; operator, L, Hogan; oiler, L. Spillane; customer's name and signature below, Frank Albano."

The other paper, which may be the reverse side of the first one I just read:

"Hoffman Rigging and Crane Service; customer, Norton Lilly; date, 10/21; day of week, Monday; job location, S.S. Jobst Oldendorff; crane No. 23; Berth No. 28; weather conditions, clear and windy; city, state, port Newark; using 100-foot main boom." Owner's mark is with an X. And below that, "Date, 10/21/68; signatures and title, Norton Lilly, by Frank Albano. Tiem arrived on job, 8:00 a.m.; time left job, 5:00 p.m. Describe work done: Unload steel. Operator, J. Gorman; oiler, T. Ciuba. Customer's name, Norton Lilly." Signed by Frank Albano.

BY MR. KLONSKY:

Q Which crane was involved with the accident, No. 37 or No. 23?

A It's the one Leo Hogan and I were on.

You have a different ticket here.

MR. KLONSKY: Can I look at what he saw before he came here to testify today, Mr. Blanc?

MR. BLANC: If you look at the Hoffman

Rigging and Crane Service lease dated October 21, 1968, for crane 37, you will be no longer confused (handing).

THE COURT: I referred to these papers at an earlier stage in this matter.

MR. KLONSKY: Your Honor did?

THE COURT: I did, because you remember I kept inquiring who was Norton Lilly, and I was reading from these papers.

Q Do you know who Norton Lilly is?

A Yes. That's the company on the piers with ITO.

Q What do they do?

A Discharge cargo.

Q Norton Lilly, is this a separate contractor than ITO? Is it it a ship's agent or what?

A Oh, I don't remember that.

Q You don't remember its relationship with the ship itself?

A I'm s'rry, no.

Q In any event, you were not present when this accident occurred, you were going out for oil, right?

A Right.

Q And you operated the crane after the acci-

dent?

A Yes, sir.

Q For what reason?

A To give the operator a rest.

Q What was the purpose of giving him a rest? What was his reaction?

A His reaction was all right. That was the normal procedure for everything.

If the oiler could operate, you always give the operator a chance to step down.

Q It had nothing to do with the accident that he asked to be relieved?

A No, sir. This is normal procedure on all cranes.

Q Where the oiler becomes an operator?

A Yes, sir.

Q Aren't there two operators usually assigned to a crane plus an oiler?

A Usually on the long boom.

Q This was a short boom?

A Yes, sir.

Q Eighty foot?

A Yes, sir.

Q Were you present when Mr. Hogan gave a

CROSS EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Spillane, back in 1968, when you had been employed by Hoffman, you were paid your wages by Hoffman, right, directly by Hoffman?

A Yes, sir.

Q And deductions were made by Hoffman and they gave you W-2 slips showing how much you earned during the course of the year, right?

A Yes, sir.

Q And when you left the yard, you took your orders from whoever was your boss, right?

A Yes, sir.

Q And you were told where to go and what you were going to do, right?

A Yes, sir.

Q And that was the procedure with respect to Hoffman's cranes attending this pier or any other pier back in 1968 prior thereto and subsequent thereto, is that right?

A Yes, sir.

Q You were hired by Hoffman, right?

A Yes, sir.

Q You were let go at the appropriate time by

Hoffman, is that right?

A Yes, sir.

Q Rehired by Hoffman?

A At a later date, yes, sir.

Q Paid by Hoffman all the time?

A Yes, sir.

Q Took your orders all the time and on this occasion from Hoffman, right?

A Yes, sir.

Q And when you got to this particular pier with Mr. Hogan, who was the operator, you two fellows knew what you were going to do, is that right?

A Yes, sir.

Q And you positioned your crane so that it could operate with respect to the unloading of the hatches or the hatch that was to be unloaded, is that right?

A Yes, sir.

Q And you determined how much clearance you needed, right?

A Yes, sir.

Q You determined how far your book should be extended, is that right?

A No. The signalman usually does that.

Q And he signals for the purposes of showing you where your cargo fall is going to be in relation to the cargo that is going to be taken out, right?

A Yes, sir.

Q And after you positioned your boom, you determine whether you have enough clearance by swinging it one way or the other, is that right?

A Yes, sir.

Q And that was done on this occasion, right?

A Yes, sir.

Q So the movements of the crane were done by you and Mr. Hogan with relation to positioning it alongside the pier and determining that you had the proper clearance to operate, right?

A Yes, sir.

Q Nothing unusual about that, right?

A No, sir.

Q And there came a time when you left the pier and only Mr. Hogan was the one who was operating the crane, is that right?

A Yes, sir.

Q And the next thing that happened is you returned after having gone back to your hard and by that time the accident had occurred?

A Yes, sir.

Q And you know nothing about the facts of the accident, right?

A No, sir.

MR. SCHWARTZ: No further questions.

REDIRECT EXAMINATION

BY MR. BLANC:

Q Were there any other Hoffman personnel a at the pier on October 21, 1968 besides Mr. Hogan and yourself?

MR. SCHWARTZ: May we have the time fixed, before or after the accident?

THE COURT: Yes.

Q Before and after the accident.

A Before the accident, no. It was just Leo and I.

Q And did any Hoffman personnel come to the pier after the accident?

A I don't really remember. There may have been somebody there after.

Usually the word gets back and they might have come over. I don't remember, though.

Q And you received all your signals concerning the discharge of the cargo from the ITO signalman, is

that correct?

A Yes, sir.

Q Thank you.

RECROSS EXAMINATION

BY MR. KLONSKY:

Q Just one question.

Who was your employer on October 21, 1968?

A Hoffman.

Q Were you ever told that there was another employer?

A Well, he's the only one that pays for me, pays my wages.

Q Were you ever told that there was any other employer than Hoffman on that day?

A No.

MR. KLONSKY: That's all.

THE COURT: Anything else?

MR. BLANC: No, your Honor.

THE COURT: Thank you, Mr. Spillane. You may step down.

(Witness excused.)

A To discharge steel from a ship.

Q What was the condition of the crane when you began the discharge of the steel?

A It was in excellent operating condition.

Q What hold were you discharging steel from when you first began to do so on October 21st at about 8 in the morning?

A The No. 1 hatch.

Q Was there any other Hoffman employee present at that time?

A Yes.

Q Who was that?

A Lloyd Spillane.

Q Was he the only other Hoffman employee who was there at that time?

A I believe there was another crane assigned to the ship.

Q Was there any other personnel from Hoffman than the two crane operators and oilers?

A No.

Q What were Spillane's duties?

A To drive the crane, inspect it under my supervision and set it up for work.

Q And did he set it up under your supervision?

A He did.

Q Where did you set it up?

A At the forward end of the No. 1 hatch.

Q On which side of the ship was that?

A On the port side.

Q And what was its position?

A I had the center of rotation at the approximately forward edge of the hatch.

Q What do you mean by positioning?

A Well, it's my job to look into the hatch before working and decide just how the crane should be positioned to most efficiently unload the ship.

Q Did you do that on October 21st?

A I did.

Q What was the position of the boom after you placed the crane in position next to the No. 1 hold?

A It was such that I would place it diagonally across the hatch in order to work.

Q Could you see into No. 1 hold from your crane cab?

A No.

Q When your crane began discharging, what was the position of the cab with relationship to the ship?

A The cab on that crane is mounted on the left side of the crane, which would put it next to the ship.

Q Would the cab be facing the bow as you began to discharge the steel or would it be facing the stern?

A I would be looking diagonally across the ship from the port bow to the starboard stern.

Q Did anyone signal you how to discharge the steel beams from No. 1 hold with the crane?

A Yes.

Q Who was that?

A The deck man or signalman.

Q Was he a longshoreman?

A Yes.

Q Did he signal you to discharge the first draft?

A Yes.

Q What signal did he give you?

A To raise the load.

Q Will you demonstrate physically what that signal was?

A (Witness demonstrates.)

MR. BLANC: Indicating the palm up and

the fingers going toward the palm with the arm extended upwards.

MR. KLONSKY: And the fingers moving toward the palm.

MR. BLANC: Yes.

Q What time did that first draft get discharged,or did you start to discharge that first draft, rather?

A Shortly after 8 a.m.

Q When he signaled you to raise the draft, did you put a strain on the draft and begin to lift it?

MR. SCHWARTZ: I object to this. I think the proper question is what did he do.

Q What did you do when he signaled you to raise the draft? What did you do?

A I raised the draft.

Q Did you then get any other signal from the signalman?

A Yes.

Q What signal did you get?

A Stop.

Q Will you show us how he gave you that signal?

A (Witness demonstrates.)

MR. BLANC: Indicating the right hand

extended horizontally to the sholder with the palm down.

Q How long after the raise signal did he give you the stop signal?

A Oh, about 15 seconds.

Q What happened next?

A I was directed to slack off the load.

Q Was that by a signal from the signalman?

A Yes.

Q And what signal was that?

A (Witness demonstrates.)

MR. BLANC: Indicating the arm extended horizontally from the shoulder with the fingers moving downward.

Q What was the next signal after the signal to lower?

A I believe I raised something in the hatch, then put it down again. Then I was hooked to a box to remove an injured longshoreman.

Q And were all of these movements of your crane directed by the signalman?

A They were.

Q With the same signals you have already described for raising and lowering?

A That's correct.

Q What happened after you removed the injured man to the dock?

A He was taken away in an ambulance and we returned to work.

Q Did you continue using the same crane?

A Yes, we did.

Q How long did you use it to discharge the cargo of steel beams?

A I believe we worked that ship for three days.

Q How long did you work on October 21st?

A A full day.

Q Would that be until 5 o'clock?

A Yes.

Q How was the crane operating during that day both before and after the accident?

A Very satisfactorily.

MR. BLANC: You may examine.

CROSS EXAMINATION

BY MR. KLONSKY:

Q Mr. Hogan, by whom were you relieved after the accident to operate the crane?

A Relieved?

Q Yes. Were you relieved by anyone?

gta Hogan-cross 51

MR. KLONSKY: May I have a moment, your Honor?

THE COURT: Of course.

(Pause.)

Q Mr. Hogan, do I understand that the first signal given to you was to raise the boom; am I correct?

A No.

Q What was your first signal to do?

A Raise the load.

Q Raise the draft? How did you do that?

A I engaged the hoist clutch.

Q Did the boom remain in its position without movement at that time?

A Yes, yes, at that time.

Q And you took it on the cable, is that right, to raise the draft?

A Yes, yes.

Q At any time did you move the head of that crane?

A Yes, I did.

Q When was that?

A After I took a strain on the load.

THE COURT: How do you mean you moved the head of the crane?

THE WITNESS: The crane boom --

THE COURT: What is the head?

THE WITNESS: The point from which the load would be suspended.

THE COURT: The end of the boom, I would call that?

THE WITNESS: Yes.

MR. KLONSKY: Where it was spotted.

THE COURT: So you have a control in the cab which enables the boom itself to be raised or lowered?

THE WITNESS: That's correct.

THE COURT: And you also have a line which passes along the boom from which the load or draft is suspended?

THE WITNESS: That's correct.

THE COURT: And you can raise the draft without raising the boom?

THE WITNESS: I can.

THE COURT: And in this case, as I understand you, you first raised the draft by pulling on the line, by winding the line around a drum, as I understand it?

THE WITNESS: Yes.

THE COURT: And then you were just about telling us, as I understand it, telling Mr. Klonsky, that you also raised the end of the boom, is that right?

THE WITNESS: It could be done by -- it could be done together as two separate motions being performed at once or it could be performed as a separate motion.

THE COURT: And which did you do on this occasion?

THE WITNESS: On this occasion I took a strain on the load line, which would draw the cables taut, and the signalman continued to signal in this manner (indicating). I paused. He looked at me. And I went thusly to him (indicating), which would indicate that I was going to raise the head of the boom.

THE COURT: Yes. And did you do so?

THE WITNESS: Pardon?

THE COURT: Did you do so?

THE WITNESS: I did.

THE COURT: All right.

MR. BLANC: Indicating the signal with the right hand extended in a fist and the thumb upward.

THE COURT: All right.

MR. KLONSKY: I would like to read part of this statement, if I may.

Should I mark it in evidence? It might as well be.

THE COURT: All right.

You are offering it in evidence?

MR. KLONSKY: Yes, your Honor.

THE COURT: All right. Any objection, Mr. Blanc?

MR. BLANC: No, your Honor.

THE COURT: Mr. Schwartz?

MR. SCHWARTZ: I have none, your Honor.

THE COURT: All right. Without objection, it will be received. Mark it.

(Plaintiff's Exhibit 13 was received in evidence.)

xx THE COURT: Excuse me. Yes, sir?

THE WITNESS: May I qualify why?

THE COURT: Yes. Speak so everybody can hear you.

Go ahead.

Mr. Hogan wants to say something.

THE WITNESS: Yes.

I would like to qualify my statement.

Q Your last answer?

A Yes.

THE COURT: Go ahead.

A The reason that I gave this signal to the longshoreman --

MR. SCHWARTZ: I object to the reason because this calls for the operation of his mind.

THE COURT: All right. I will take it.

Go ahead, Mr. Hogan.

THE WITNESS: Prior to setting up to work that hatch I had seen that the draft was under the coaming and that it would have to be pulled out toward me so as not to foul the cables in the coaming or the lifting device.

This is why I so signaled the signalman.

Q You signaled the signalman?

A Yes, I did.

Q All right.

Is this your signature on the bottom of the first page, Mr. Hogan (indicating)?

A Yes, that is.

Q And is that your signature on the last page?

A Yes, sir.

Q And this is dated August 20, 1969, correct?

A Yes, sir.

Q And was your memory better at that time as to the events of the accident than they are now?

MR. BLANC: I object to the question as argumentative, your Honor.

THE COURT: I will permit it.

You can answer.

THE WITNESS: Shall I answer?

THE WITNESS: Yes.

A I don't think that it would be any better then than it is now.

Q You read this statement before you came here to testify today, correct?

A Yes, I did.

Q Would you read from this point where I have my finger to the end of that page, starting with "At."

A "At about 8:15 a.m. I received a signal from the gangwayman to put a strain on the draft (the first draft) and to raise it. The next signal received from the gangwayman was to stop. I was then signaled to land the draft. I was then informed that one of the hold men had been injured in the hold."

Anything further?

Q That's it.

Was there any signal other than the raising of the draft before the stop signal was given to you?

A No, sir.

Q And the raising of the draft was done by the taking in of the cable, is that right?

A It could be done two ways, sir.

Q It could be done. What was done here?

A Topping the boom would raise the draft also.

Q What did you do here? Did you just take in cable or did you top the boom too?

A I took a strain on the cable, then signaled the deck man that I was going to top the boom.

Q Do you see that anywhere here in your statement?

A No, sir, I don't.

Q Do you see it in any other statement that you know of?

A That's the only statement.

Q That's the only statement you gave.

Is there not a separate signal for the movement of the head of the boom as compared to the movement of the cable being drawn in?

A Yes, there is.

Q What is the signal for the movement of the head of the boom?

A Up (indicating), down (indicating).

Q Did he give that signal to you?

A No, he did not.

Q But you nonetheless moved the head of the boom?

A Yes, I did.

MR. KLONSKY: I have nothing further.

THE COURT: All right. Mr. Schwartz?

CROSS EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Hogan, prior to October, 1968 you had been an employee of Hoffman for a goodly period of time, right?

A Since February of that year.

Q And you were paid on all those occasions directly by Hoffman, right?

A Yes, sir.

Q Your Social Security, income tax and everything else was withheld by Hoffman, right?

A Yes.

Q You were hired by Hoffman, right?

A Yes.

Q You were released, when they didn't want you any longer, by Hoffman, is that correct?

A Yes.

Q You took your orders with respect to where to go and what you were to do from Hoffman, is that correct?

A Yes, sir.

Q And that was true on this very occasion on October 21, 1968, is that correct?

A Yes, sir.

MR. KLONSKY: Did you answer that question?

THE WITNESS: I did.

Q And on this occasion, on October 21, 1968, you said you and Mr. Spillane, as your oiler, attended this pier and I think you said you went down into -- you went aboard the vessel?

A I did.

Q To determine how the cargo lay and how you should position your boom and truck crane, is that right?

A That's right.

Q That's what you said?

A Yes, sir.

Q Did you look into the hatch?

A I did.

Q It was open, rig ht?

A Yes.

Q The cargo was revealed to you, is that right?

A That's correct.

Q Where did you see the cargo which was to be the first draft, where was that laying with respect to the square of the hatch?

A There was a draft, a single draft which would make up the top layer on the offshore side of the ship from me under the coaming.

Q It wasn't in the square of the hatch?

A It was not.

Q It was in the coaming?

A Under the wing, yes.

Q That is the offshore side?

A Yes, sir.

Q You were in the No. 1 hatch, which is the hatch closest to the bow of the vessel, right?

A Yes.

Q And there is a curvature of the sides of the vessel at that point, isn't there?

A That's correct.

Q There is very little of a wing, if any,

in that No. 1 hatch, isn't that true, on the day of this accident, October 21st?

A No, there is quite a wing, sir.

Q And you saw that as you observed it that the first cargo was not in the square but was in the wings on the offshore side?

A What it would up to be, the first draft was --

Q The fact of the matter is that this accident occurred during the discharge of the very first cargo, the very first draft, is that right?

A Yes, sir.

Q That's true.

And you were alone on the day of the accident at the time that you were operating the crane with respect to personnel on the crane? You were the only one?

A That's right.

Q The boom had been positioned as you wanted the boom to be positioned to begin with, right?

A No, sir. The boom was positioned as I was directed by the deck man to position it.

Q Didn't you go aboard to determine how you wanted to position this boom?

A No.

I went aboard to determine how I would position the crane carrier, the chassis.

Q The what?

A The chassis of the crane, the truck section.

Q In order to determine where the boom should be in relation to the cargo that was going to be lifted out of the hold, right?

A To determine the center of rotation of the crane, sir.

Q And that was your responsibility, right?

A Yes.

Q You got a signal which was a signal well know[illegible]o you to take a strain on the draft, right?

A That's right.

Q And then you took a strain on the draft and you decided to top the boom in order to swing it out as you had observed the cargo laying when you went aboard the vessel, is that right?

A I motioned to the signalman that that was what I was going to do, yes, sir (indicating).

Q And you motioned to him after you had taken a strain on the cargo so that there was some pressure pulling the cargo, right?

A Yes.

Q And then you gave him a signal as to what you were going to do, right?

A Yes, sir.

Q And that was a signal that you were going to top the boom?

A Yes, sir.

Q And that was your decision that was made, right?

A Yes, sir.

THE COURT: Of course, topping the boom would raise the draft?

THE WITNESS: Yes, sir.

Q And when you raised the draft, if that cargo -- withdrawn.

When you take a strain on the cargo fall which has attached to it the draft, your boom has a tendency to go down a little bit, isn't that right, because of the weight?

A Yes, a slight amount.

Q And if you were to raise it in that position, the boom would be extended beyond the draft of the cargo, using a plumb line as to beyond the draft?

A No, sir, it would not.

Q It would not?

A No.

Q If you raised it in that position, she would swing, would she not, the draft?

A Would swing?

Q Yes.

A I think you are going to have to clarify that question.

Swing is a term used to denote another movement of the crane.

Q I am not talking about the crane, I am talking about the draft would swing, would it not, if --

A The craft would be caused to move.

Q Be caused to move.

And which way it would move would depend upon how you moved the boom, the head of the boom, is that right?

A That's correct.

Q And you decided to then raise the boom so that you could swing the cargo from underneath the wing toward the square of the hatch, and that would be from offshore to inshore, isn't that right?

A It would move the cargo diagonally towards me.

Q And that would be across the ship?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And that would be from offshore to inshore, is that right?

A Yes.

Q You were on the inshore side of the vessel on the pier, right?

A Yes, sir.

Q So by your movement this draft swung from the offshore side toward the inshore side, isn't that right.

A Yes, sir.

Q And there were only two signals given by the signalman, one was to take a strain on the cargo, is that right?

A That's correct.

Q And the other was to stop whatever you were doing after you had done what you just described, isn't that correct?

A Yes, sir. The signal was to hoist the cargo (indicating).

Q The first was to take the strain on the cargo?

A Raise the cargo.

Q That is with an extended arm and the fingers moving toward the wrist, is that right?

A That's correct.

Q Indicating take a strain?

A Yes, sir.

Q And then you in turn did what you did and then gave him the signal with your thumb that you were going to raise the topping lift?

A Yes, sir.

MR. BLANC: I object to the form of the question. I think it is two questions, your Honor.

THE COURT: All right. Break it down then, Mr. Schwartz.

Q After you had taken the strain on the boom, you then proceeded to raise the head of the boom and gave him the signal with your thumb?

A Yes. I gave him the signal before I raised the head of the boom.

Q And the only signal thereafter by the signalman was for you to stop, is that right?

A That's correct.

Q What you ha ne?

A Yes.

266a

Q Is that right?

A Yes.

Q And you said that the reason that you decided to raise the head of the boom was because as you observed it, the cargo was in the wing partly, right?

A Correct, yes.

MR. SCHWARTZ: No further questions.

(Continued on next page.)

REDIRECT EXAMINATION

BY MR. BLANC:

Q The signal which Mr. Schwartz has just demonstrated with the arm extended and the fingers moving toward the palm is the signal to raise the draft, is it not?

A That's correct.

Q That is not a signal to take up a strain, is it?

A No.

THE COURT: What is the signal to take up the strain?

THE WITNESS: There are several signals, your Honor, that might be used.

One might be or one is listed as such (indicating). That means lift slowly.

Q Indicating the forefinger of the right hand toward the palm of the left hand above it.

A Yes.

Longshoremen will use a signal where they barely move their fingers if you can see them, or they might clench their fist in this position as to indicate slowly hoist (indicating.

THE COURT: What signal did the signalman

give on this occasion?

THE WITNESS: Hoist the load.

THE COURT: And what does that mean, the signal that you have just shown us?

THE WITNESS: Raise the load.

THE COURT: Raise the load?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q After you gave the topping signal --

THE COURT: Excuse me.

Does it mean raise the load by raising the line or the fall by winding the fall, or does it mean top the boom?

THE WITNESS: It means raise the load by winding the fall.

THE COURT: By winding the fall?

THE WITNESS: Yes, sir.

Q After you gave the signalman the topping signal, did he give you any signal to stop at that immediate time? As soon as you gave him the topping signal, did he give you a stop signal?

A No, sir.

MR. BLANC: That's all.

RECROSS EXAMINATION

BY MR. KLONSKY:

Q Let me ask you this: Did you go to the scene of the accident after it occurred?

A No, sir.

Q You didn't look down into the hatch?

A No.

Q Do you know as a fact that the point of contact with the plaintiff was about 35 feet from where the cargo was first raised?

A Yes.

Q You knew that?

Could you explain to us how that draft came from 35 feet away on the offshore side to the inshore side where he was struck?

A I was sitting in the crane, sir. I couldn't see how it came.

Q Isn't it because you rotated the head of that boom toward the inshore side as you were discharging that draft?

A No, sir.

Q Have you any way to explain this other than the fact that it may have been act of God?

MR. BROOKLYN: I object to the form of

the question, your Honor.

THE COURT: Yes. I think that is objectionable as to form.

Q Let me ask you this, sir:

Did you know who the gangway man or signalman was for the stevedore on that day?

A No, I did not know the man.

Q Had you ever seen him before?

A No, sir.

Q Did you discuss with him which signals you would use, what the meanings of the signals would be?

A No, sir.

Q You never talked to him before you started, did you?

A No.

MR. KLONSKY: That's all.

RECROSS EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Hogan, do you have the statement which you signed for Mr. Blanc or his client before you?

Here it is.

MR. BLANC: For the record, that statement was made for the federal safety inspector on the

accident date, it was not taken by my firm or myself.

MR. SCHWARTZ: It wasn't made on the accident date, though. There is a different date on here.

MR. BLANC: That is not the date that it was taken.

Q Mr. Hogan, is there a difference between raising the draft and putting a strain on the draft? Is there a difference?

A Yes, there would be.

Q Putting a strain on the draft is not raising the draft, right?

A That's right.

Q Putting a strain on the draft merely means to tighten the line so there is no slack, is that right?

A Yes.

Q Is that right?

A Yes, sir.

Q Look at the statement, Plaintiff's Exhibit 13.

Is this in your handwriting?

A No, sir.

Q You signed that statement, right?

A I did.

Q And therefore it was true at the time that you gave it, right?

A Yes, sir.

Q It says here:

"At about 8:15 a.m. I received a signal from the gangwayman to" -- and whoever took the statement put the words "raise a draft," the word "raise" was eliminated and inserted was put "put a strain on the draft," right?

A Yes.

Q Do you see that?

A Yes.

Q So that when you signed this statement, the only signal that you were talking about that the signalman gave before the accident was merely a signal to put a strain on the draft,which was the first draft which you put in parentheses, is that correct?

A I didn't put any parentheses.

Q It was written that way, wasn't it?

A Yes, sir.

Q And when you signed it that the only signal that he gave before the accident was a signal to put a strain on the draft, isn't that right?

A Yes, sir. More properly it should have

been --

Q No, no, not more properly. That's what you signed, isn't it?

A That's correct.

Q Do you know when this statement was signed, which bears a stamp August 20, 1969, which is Plaintiff's Exhibit 13 in evidence?

A It was signed on that day.

Q So it was signed in August of 1969, right? Up there.

A No, sir. Here is the date here (indicating).

Q That has reference to the date of the accident as being October 21, 1968?

A That is the date --

Q This has a rubber stamp of August 20, 1969. Is that the date you signed this statement, which is Plaintiff's Exhibit 13.

A No, sir. The date I signed that was the date it was given.

Q The date it was given --

THE COURT: Wait. I can't hear. The date you signed that is what?

THE WITNESS: The date that I gave the

statement.

THE COURT: And what date was that?

THE WITNESS: On October 21, 1968.

THE COURT: The date of the accident?

THE WITNESS: Yes.

Q And can we agree, Mr. Hogan, that what it says there is that "At about 8:15 a.m. I received a signal from the gangwayman to put a strain on the draft (the first draft)," is that right? That's what that statement says, does it not?

A Yes. It says "raised," but "raised" is crossed out.

Q You say you signed that on the date of the accident?

A Yes, sir.

Q Now, I want to show you another statement taken on October 21, 1968, the very day of this accident, and ask you whether that is your signature at the bottom of each of those two pages (handing).

Is that your signature at the bottom?

A Yes, sir.

Q Do you remember how many times you were interviewed that day, October 21, 1968?

A No, sir. I don't recall that anywhere.

Q You don't recall, but that is your signature, isn't it?

A Yes, sir.

THE COURT: Is that document in evidence?

MR. SCHWARTZ: Not yet, your Honor.

MR. KLONSKY: Can I look at that when you have a chance, Mr. Schwartz?

MR. BLANC: Can you mark it for identification?

MR. SCHWARTZ: Yes, let us mark this for identification first.

(Defendant ITO Exhibit D was marked for identification.)

xx Q Back on October 21, 1968 were you 34 years of age?

A Yes, sir.

Q Did you reside then at 13 Bedford Road, Kendall Park, New Jersey?

A I did.

Q Were you employed as an operating engineer by the Hoffman Rigging & Crane Service?

A I was.

Q Was your license number 3885?

A I believe so.

Q You believe so? Is there any doubt about it?

A I have the license here.

Q Look at this and see your other statement, Plaintiff's Exhibit 13.

Doesn't that say your license number is 3885?

A Yes, sir.

Q So the license is correct.

Do you see at the bottom of the page on page 2, "I read the above and I find it to be true and correct to the best of my knowledge and taken by O. Cannamela"? Do you see that?

A Yes.

Q And you signed that, right?

A That's my signature.

Q And you signed the first page, is that correct?

A That's my signature.

MR. SCHWARTZ: I offer it in evidence.

MR. KLONSKY: May I see it, please.

No objection.

THE COURT: Any objection, Mr. Blanc?

MR. BLANC: No objection.

llgta Hogan-recross

THE COURT: All right. Without objection it will be received.

(Defendant ITO Exhibit D was received in evidence.)

xx Q After the part that I just read, Mr. Hogan, it says:

"October 21, 1968 I was assigned by the company to operate a Lima truck crane at No. 1 hatch of the S.S. Jobst Oldendorff, docked at Berth 28A in Port Newark, New Jersey."

That's correct, isn't it?

A Yes, sir.

Q "The company's crane number is as follows: S37."

Correct?

A Yes, sir.

Q "On this day I began working at 8 a.m."

Correct?

A Yes.

Q "A gang of longshoremen was preparing drafts of I steel beams stowed in No. 1 hold of the ship."

Is that correct?

A That's what it says.

Q "I was getting the signals from the gang-

wayman, who was standing on the forecastle forward end end of the hatch aboard the vessel."

Is that correct?

A Yes, sir.

Q "At about 8:15 a.m. I received the signal from the gangwayman to put the strain on a draft, first draft, and to raise it."

A Yes.

Q Correct?

A Yes.

Q And, again, the signal that you got and what you recited in this statement was to merely put a strain on the draft, is that correct?

MR. BLANC: I object to the question because it says --

A And to raise it.

THE COURT: Yes. It says "and to raise it."

Q And to raise it?

A Yes, sir.

Q And the next signal received from the gangwayman was to stop, is that correct?

A Yes, sir.

Q And those were the only two signals that you

received, is that right, from the gangwayman?

A That's correct.

Q "I was then signaled to land the draft."

That was after he had signaled you to stop is that right?

A Yes.

Q So going back to the time of the first signal to put a strain and to raise and the next signal from the man to stop, the only signal that was given by anyone was by you in connection with your signal that you were going to top the boom, is that right?

A That's correct.

Q And that was after you had put the strain on and after you had taken up on the topping lift fall, is that right?

A After I had taken up on the joist fall.

Q And then you were ready to do what you wanted to do, is that right?

A Yes.

Q And after you had done that and after you had signaled, the signalman then gave you a signal to stop, is that correct?

A Yes.

Q And then you said:

14gta Hogan-recross

"I was then informed that one of the longshoremen had been injured in the hold."

Is that correct?

A Yes.

MR. SCHWARTZ: The rest of the statement is in evidence, your Honor, and I don't mean to consume time.

THE COURT: All right.

MR. KLONSKY: Mr. Blanc, do you have any further questions? Because I have one.

MR. BLANC: I am not quite sure of the sequence here.

MR. KLONSKY: You are next.

THE COURT: Go ahead, Mr. Blanc. We will give everybody a chance anyway before we finish.

REDIRECT EXAMINATION

BY MR. BLANC:

Q Was there any other Hoffman employee than Mr. Spillane and yourself who gave you any directions in connection with the use of the crane to discharge the draft of cargo that you later learned was involved in this accident?

A No.

MR. BLANC: Thank you.

15gta Hogan-recross

RECROSS EXAMINATION

BY MR. KLONSKY:

Q Mr. Hogan, from your position in the cab you could not see into the hold where the draft was being made up, could you?

A I could not.

Q You could not see.

And therefore you depended upon the eyes of the signalman to direct you?

A That's right.

Q By a signal.

And it is his function to be able to look down into the hatch and see what you couldn't see, is that true?

A Yes.

Q And gave you a signal with his hands extended while he is looking down into the hatch, is that true?

A Yes.

Q And at that time his back would be to you, is that true?

A Yes.

Q What kind of a signal did you give him when his back was to you; was it oral or was it with your hand?

A I stopped momentarily. He looked to see why I had stopped. I then gave him this signal, sir (indicating).

Q And did he say "Go ahead"? Did he tell you to go ahead?

A He continued with the hoist signal.

Q He looked at you, you say?

A Yes, he did.

Q Is there any reference in any of your statements to that effect, that you gave a signal after his first one to take a strain?

A No, there is not.

Q Did you discuss your testimony with a Captain Wheeler?

A I don't recall, sir.

Q That is the gentleman seated right there. Did you talk to him about what your testimony might be?

A No, sir.

Q Did you talk to him at all?

A No, sir. I don't recall speaking to the man.

MR. SCHWARTZ: He is my expert.

Q Did you talk to Mr. Blanc with respect

22gta Yokum-direct

contend there was anything defective with this crane.

THE COURT: Never mind. Let us get a record of his testimony. I will take it.

Go ahead, Mr. Blanc.

Q I believe you have heard the testimony this morning of Mr. Hogan and Mr. Spillane as to the manner in which they set up the crane cab and the manner in which the boom was angled over the No. 1 hold. Is that correct?

A That is correct.

Q And you have also heard their testimony as to Mr. Hogan taking a strain up on the first draft and then raising the first draft and topping the first draft.

On the basis of that testimony and your experience, can you state with a reasonable degree of certainty as to whether that was a normal crane operation on that date?

MR. KLONSKY: Objection.

MR. SCHWARTZ: Objected to.

THE COURT: I will take it for what it is worth.

All right, go ahead.

A Yes, sir. The operation as it was

explained fits exactly into the normal procedure that you see taken on jobs of this type regularly.

MR. KLONSKY: That I must ask be stricken, your Honor.

Q Insofar as taking up the strain --

MR. KLONSKY: I have an objection, Mr. Blanc.

MR. BLANC: I didn't hear you.

MR. KLONSKY: I object on the ground of what he has done regularly. He has not shown that he has been there at all in the operation of a boom.

THE COURT: I will take it for what it is worth. Overruled.

Q Will you tell us what the customary procedure is for a crane operator to take up the strain on a draft such as that involved in this accident?

A Yes.

The signal being given to raise the load, the crane operator would not normally just lift the load, especially on a first draft. He would, as the expression was used, take a strain, which would determine to him that his outriggers were set properly, that the crane was steady, that all of the rigging and tackle was properly seated, and then he would pro-

23gta Yokum-direct

ceed to take the weight of the load.

Q And would he do that after receiving a raise signal?

MR. KLONSKY: I object to that, your Honor.

THE COURT: Overruled.

A Yes. Being given the signal to raise the load, any experienced operator would normally, as the expression is used, set the load.

In other words, as I explained, take a strain and make sure that all of the tackle was running properly, that everything was in order, and then he would proceed to lift, being given the signal to raise the load.

Q And assuming that the crane operator gave the longshore signalman the topping signal, what should the longshore signalman do in the normal course of this kind of an operation if he does not want the crane topped?

MR. SCHWARTZ: Objected to, your Honor.

THE COURT: I will permit it.

MR. KLONSKY: Could I please have that question read back, your Honor?

THE COURT: Yes, of course.

Mr. Reporter.

(Record read.)

MR. KLONSKY: I join in the objection, your Honor.

THE COURT: I am going to take it. Overruled.

A The gangwayman or the signalman would signal the crane operator not to proceed with the operation that the operator had signaled for if it would jeopardize the job or if there was some reason that the crane signalman knew that this operation should not be performed.

Q And what is the stop signal that is normally given by a longshore signalman?

A Just hold his hand out straight, palm down (indicating).

Q Assuming that Mr. Gomez testified that he was standing at the forward inshore corner or toward the inshore corner of the No. 1 hatch opening on the main deck, what could he see as to the angle of the hoist line?

MR. SCHWARTZ: Objected to, your Honor, as to what somebody else could see; completely speculative.

THE COURT: Yes. I don't think that we can ask him that.

Sustained.

Q Assuming that the signalman was standing in that location, what would the angle of the hoist line be with reference to where he was standing?

MR. SCHWARTZ: Objected to, your Honor, in that all of the facts have not been set forth as to the testimony in the case.

THE COURT: I will consider that as going to the weight of the evidence. I agree.

I will permit him to answer, if he can.

A As it is described, I understand that the signalman then would be in line with the operator's vision and also in line with the load hoist line, so that neither the operator nor the signalman, under those circumstances, would be able to tell when the lift or hoist line was out beyond the tip of the boom or toward the operator.

In other words, neither the signalman nor the operator would be able to see which way the load would drive since neither of them were standing off at right angles so that they could see that angle.

Q Again, assuming that the longshoreman was in that position, the signalman, would that enable him to see the load from where he was standing?

26gta Yokum-direct

MR. SCHWARTZ: Objected to, your Honor. Your Honor ruled on that question before in my favor.

THE COURT: Yes. I think it is the same question. Sustained.

Q Assuming, as Mr. Hogan has testified, that he first took a strain on the draft and then raised the draft and then topped the boom, what would be the effect of that procedure on raising the draft?

MR. KLONSKY: Objection, your Honor.

THE COURT: I will permit that.

A If all the slack had been taken out of the cables, out of the hoist line, and then the boom were topped, meaning that the boom tip was raised, this in turn would bring the boom tip in closer to the crane operator, it also would raise the boom tip and in raising the boom tip would raise the load and cause the load to drive toward the crane.

Q And assuming that the signalman observed that process, what would his duty be at that point?

MR. SCHWARTZ: Objected to, your Honor. There is no testimony that he observed that process. Mr. Gomez' testimony is replete with what exactly was done on this occasion.

THE COURT: I take it the question asks him

27gta Yokum-direct

to assume something.

Can you put it to him in the context of an assumption?

MR. BLANC: Yes.

Q On the assumption that the draft began to drive, as you call it, toward the inshore side, what was the signalman's duty at that point?

A If the signalman were aware that there was any danger involved, his duty was to stop the operation. If there appeared to be no danger and the load was drifting in the way that everybody would expect it to under those circumstances, there would be no reason to stop the load from moving and to continue with the lift.

Q Thank you.

MR.BLANC: You may examine.

CROSS EXAMINATION

BY MR. KLONSKY:

Q Do I understand, sir, that the first load is the load to test the gear and equipment being used by the crane operator?

A In every instance the crane operator has to make sure that his lines and everything about the crane is properly assembled, and the only chance he

28gta Yokum-cross

has is on the first lift.

Q Is it not therefore required by the crane operator to know what the first lift consists of, what the draft is?

A No.

Q 62-foot beams, which are longer than the fore-and-aft distance of the hatch itself, does that create a special problem?

A Not for the crane operator; just for the signalman.

Q Shouldn't the crane operator know the nature of the draft that he is going to lift when he is testing equipment at the same time?

MR. BLANC: Objection to the form of the question. It is calling for the knowledge of the crane operator.

MR. KLONSKY: Well, you have given more knowledge than he possesses, I think.

THE COURT: I think you getter put another question, Mr. Klonsky.

MR. KLONSKY: All right. I have nothing further.

29gta Yokum-cross

CROSS EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Yokum, you said that an experienced operator would set the load, is that right?

A That's correct.

Q An experienced operator on the first draft would also be testing all the appurtenant parts of the crane, isn't that correct?

A That's right.

Q In other words, an experienced operator would be taking a strain on the load to see how the lines ran, is that right?

A In so far as he had the ability to watch them and get the feel of it on his crane, yes.

Q He is the only one who has the ability to feel this, isn't that correct?

A That is absolutely correct.

Q He is the only one operating the crane, isn't that correct?

A Yes, sir.

Q After he set the load and he knows that he has the slack out of it, the next thing is for him to test his topping lift as to how he wants to swing the boom, is that correct?

A Well, he doesn't test it just automatically.

Q He tests it by putting it in operation slowly and seeing how it works, isn't that correct?

A But not just doing it without letting somebody else know what he is doing.

Q Mr. Yokum, haven't you as a longshoreman -- have you ever been a signalman?

A Yes, sir.

Q Have you seen shoreside crane operations often?

A Yes.

Q Isn't it true that an operator of a crane with respect to the topping lift of the boomhead, that he is the one that determines what he wants to do with respect to raising or lowering the boom? And you have seen that as a signalman?

A I wouldn't want it to be inferred -- if I answer yes, I would not want it to be inferred that he would make this -- perform this operation without the tacit or acknowledged acquiescence of the signalman.

Q That is language, Mr. Yokum.

Taci t acknowledgement, that means silence, is that correct?

A That is correct.

31qta Yokum-cross

Q Okay. But other than that, the operator is the one who does this time and time again, as you have seen it in your operation as a signalman employed as a longshoreman, isn't that true?

A He does it,but not without letting somebody else know what he is doing.

Q The fact of the matter is, if there is a draft underneath a wing and he is going to take a strain on the fall, which, in turn, is going to take the slack out of the line, because we have the pressure of the draft pulling it tight -- right.

A Yes.

Q When he does that, the head of his boom comes down a little bit because of the weight that is now on the head of the boom, isn't that true?

A It probably would.

Q Probably? Isn't it true without any question at all that that's what will happen to the head of the boom as you have observed it? You got a weight on there now.

A It depends -- the reason I don't say yes is because I don't know how much strain he has taken on the cable. Assuming that he has put strain to the point where he is ready to raise it, there is weight

in some way, he may want to raise the boom and then he would signal the signalman that this is what he wants to do.

THE COURT: In the normal operation of a shoreside crane, does the signalman indicate when the boom is to be topped?

THE WITNESS: He should, yes.

THE COURT: The signalman?

THE WITNESS: That's correct.

THE COURT: But you say sometimes the operator makes the decision himself?

THE COURT: He may decide that he wants to do that, but I have insisted here that he would not do it unless he transmitted his wish to the signalman.

THE COURT: All right.

Q This operator, Mr. Hogan, was sitting in the cab of the crane on the pier, which is many feet below the main deck where the signalman stands, isn't that correct?

A I haven't seen the location --

Q Did you hear Mr. Hogan say that he could not see anything up there once he got into his crane?

A He could not see anything up there?

Q Yes.

operation of the hook or the block at the bottom of his load line.

Q And isn't it true, Mr. Yokum, on the basis of your experience as a longshoreman with truck cranes on a pier, that the crane operator sitting in the cab raises and lowers the head of that boom, the topping lift, on many occasions without any kind of signals which he transmits to anybodyelse?

You have seen that, haven't you?

A Having received such a signal from the signalman.

Q To do what?

A To raise the boom.

Q Having raised the boom, the only thing he has to do is to take up on the fall, isn't that correct, that he's going to raise the load?

A Let's make sure we are talking -- we are talking about the hoist line or boom?

Q We are talking about hoist line now.

A Yes.

Q If he has gotten a signal from the signalman to raise, that means he wants the draft to be lifted, that's right, isn't it?

A That is correct.

Q He is not telling him to raise the topping

37gta Yokum-cross

lift or to do anything with the head of the boom, isn't that right?

A That's correct.

Q And haven't you seen in your experience as a longshoreman, as a signalman, that crane operators operate their cranes so that they raise the topping lifts and thereby raise the head of the boom without giving any signals? Haven't you seen that?

A I wouldn't say it's never been done, but it's not right.

Q So if he did this, if he did this without giving a signal and if there is testimony that there was no signal given, you would say that that would not be proper, isn't that correct?

A That is correct.

Q You said if the draft was beginning to drift it would be the signalman's duty to stop it, right, by a signal?

A If he saw any danger in it.

Q Did you hear the testimony of Mr. Hogan that the signals which were given were as follows:

There was a signal by the signalman to take a strain on the draft --

A No.

on the draft, the first draft, and to raise it?

A Yes.

Q Did you hear him say that?

A Yes, yes.

Q So he said it both ways, didn't he?

A Yes.

Q Assuming that that is true, that that's what he saw and that's what he has testified to -- okay?

A Yes.

Q Assuming that to be true, the next thing is for the crane operator to take over, is that right?

A For the crane operator to take over?

Q Yes. And to do what the signal requires him to do?

A Right, with his eye on the signalman.

Q Okay.

And did you hear him say that after he gave the signal with respect to the topping lift and after he had put it in motion, that the next thing that he received from the signalman is to stop by a signal?

A Yes.

Q Did you hear that?

A Yes.

Q So there was a signal given by the signalman to stop?

A Yes.

Q And that's what the signalman should have done when this was done by Mr.Hogan, isn't that correct?

A If Mr.Hogan's motion was not in order, he should have done it.

Q No, no.

MR. SCHWARTZ: I move to strike it out.

THE COURT: No. Let it stand.

Go ahead.

MR. SCHWARTZ: May I have the answer then, your Honor.

(Record read.)

Q Did you hear the testimony that the signalman's next signal after the first one that the signalman gave was to stop the movement of the draft, did you hear Mr. Hogan testify to that?

A Yes.

Q And that was proper for the signalman to do, isn't that correct?

A Yes.

MR. SCHWARTZ: No further questions.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. BLANC:

Q Is it correct that the only time the crane operator tops the boom without giving or receiving a signal from the signalman, giving one to him or receiving from him, is when the fall from the crane boom is returning into the hatch free and clear of cargo?

MR. SCHWARTZ: I object to this as leading and suggestive, and I say it is putting the answer in the mouth of the witness.

THE court; I will treat your objection as going to its weight.

Overruled.

A That is correct.

THE COURT: May I see that ITO Exhibit D again, please.

MR. BLANC: That's all I have, your Honor.

THE COURT: All right. Anything else?

MR. KLONSKY: No questions.

MR. SCHWARTZ: No questions, your Honor.

THE COURT: All right. Thank you very much, Mr. Yokum.

(Witness excused.)

44gta

including that of Mr. Gomez taken on February 4, 1976, is before your Honor on the third-party complaint.

THE COURT: On the claim of the plaintiff against Hoffman, I am bound to find, and find, that Hoffman is liable to the plaintiff.

I am persuaded that the raising of the boom by Hoffman was negligent, and the testimony today of the Hoffman crane operator confirms that he topped the boom, that is, he brought it up higher, elevated the head of the boom, without any signal from the signalman.

He says that he gave a signal himself. He made the decision to do it and gave a signal to the signalman.

Of course, normally the signalman's back was turned to the crane operator.

He says that he stopped. That he stopped, I don't know what he refers to, whether he means he stopped tightening the fall or winding the cable, or whether he means he had started topping the boom and stopped topping it. But he says that when he stopped the crane operation, that caused the signalman to turn around and look at him, and he then gave a signal to indicate that he was going to elevate the head of the

boom.

I notice that in Plaintiff's Exhibit 13 and ITO Exhibit D -- and ITO Exhibit D, at least, was a statement of the crane operator made on the very day of the accident -- there is no mention of elevating the head of the boom in any way, shape or form, and there is no mention of any signal from the crane operator to the signalman that he was going to do so.

On the other hand, the testimony of Gomez, the signalman, is quite explicit. For some reason we have been furnished, or the clerk has a copy, or there is in the clerk's file, a transcript of the testimony of Gomez, and on cross examination by Mr. Cohen, at least, Gomez unequivocally says that the tip of the boom was raised, the boom was topped without any signal from him, Gomez. That, of course, is confirmed by the Hoffman crane operator.

Of course, Gomez says nothing whatever about any signal from the crane operator that that's what he was going to do, and Gomez says nothing about anything being stopped and his turning around to look at the crane operator.

I am bound to say that elevating the tip of the boom caused the sliding motion inshore of the

draft which hit one of the I-beams, which in turn fell on the plaintiff and caused the accident. So I am bound to say that the plaintiff has established liability on the part of Hoffman.

As to all the other issues in the case and how we resolve this, fairness and equity and justice, it seems to me, are served if the recovery of the plaintiff or if half the damages -- and if it is necessary to fix damages I am going to accept the jury's verdict in that respect -- half of the damages ought to be borne by the stevedore and half of the damages ought to be borne by Hoffman, the crane operator.

In the midst of all this welter of Second Circuit law, claims, counterclaims and cross claims and direct claims, I don't know how I can pick my way to accomplish that result, but that is what I have to figure out.

Mr. Klonsky, do you know how it can be done?

If I give you a judgment in the full amount against Hoffman and you got a judgment in the full amount against the shipowner, obviously you can't recover twice.

MR. KLONSKY: That's right.

THE COURT: What happens? Do you then

47qta

have your choice as to whether you collect everything against Hoffman?

MR. KLONSKY: I have no choice, your Honor. But I would defer to Mr. Schwartz, who has much more experience in third-party cases than I have.

I usually stop when I sue the defendant. I have no interest in going beyond ordinarily. But Mr. Schwartz has been beyond many times and I would defer to his thoughts on this subject, your Honor.

MR. SCHWARTZ: I refuse to be amicus to the plaintiff, your Honor.

THE COURT: But you ought to be amicus, Mr. Schwartz, to the court.

MR. SCHWARTZ: I think there is something else that you might take into consideration, your Honor.

I don't think you are making new law or it is pioneer justice; I think it is a question of equity too, as your Honor indicated.

Your Honor has indicated at the outset of today's session that we are being held -- when I say "we," it is ITO -- are being held liable because the negligence of our employees is imputable to us and which constitutes a breach of the warranty of workmanlike

52qta

MR. KLONSKY: Maybe they can stipulate to that result and let the Court of Appeals find out whether that should stand on liability only.

THE COURT: I think that's what I will do, whether it is stipulated to or not.

MR. CICHANOWICZ: Your Honor, there is a case in the Second Circuit, Hartnett against Reis, in which the shipowner was held liable and then he was allowed 50 per cent recovery against two co-stevedores. That way, apparently, would be no problem.

The finding against Hoffman may create a problem.

MR. KLONSKY: The trouble is, your Honor, that they cannot be treated as joint tort-feasors, the stevedore and Hoffman, because the stevedore could not be sued directly by the plaintiff inasmuch as he is the employer, and an employer is not a joint tort-feasor. That is the major problem as I see it to give any clear resolution of this.

MR. BLANC: One other aspect of the problem your Honor has not considered but may wish to take into account before entering judgment is the contention of Hoffman throughout this case that the crane operator and the crane oiler were the borrowed servants of ITO.

53gta

They were under ITO's supervision and control insofar as the discharge of this cargo was concerned; the crane was in good working order and condition; both the operator and the oiler were experienced and for that reason I don't believe that Hoffman can be held solely liable.

MR. SCHWARTZ: Having received that brief this morning on the ad hoc employment, I am not prepared to give your Honor the cases that in this context these employees legally are not ad hoc employees of ITO.

THE COURT: What is the brief to which you are now referring?

MR. SCHWARTZ: I got something from Mr. Blanc this morning.

MR. KLONSKY: I didn't get a brief.

MR. SCHWARTZ: I should indicate this to your Honor, thuough:

On the basis of the testimony that was elicited this morning from Mr. Spillane and Mr. Hogan, to meet that contention in the brief of Hoffman first delivered this morning, the testimony is unequivocal and undisputed that these employees were never the ad hoc employees of ITO. They took no orders from ITO, they were hired and fired by Hoffman, the direction and control over

54gta

all their activities was by Hoffman, and therefore there is no ad hoc employee contention that could possibly be viable in this case.

THE COURT: I have just been handed something called "Trial Memorandum on Behalf of Third-Party Defendant Hoffman."

But isn't this something that I have had all during the trial?

MR. BLANC: No, your Honor, this is just for the indemnity trial.

MR. KLONSKY: Why did I not get a copy?

THE COURT: Then this must be -- haven't you gotten a copy of it?

MR. KLONSKY: Did you serve me with a copy, Mr. Blanc?

MR. BLANC: I thought so. Let me double check.

MR. KLONSKY: If it was this morning that he served it, I wasn't in my office this morning.

MR. BLANC: I can't answer that at the moment.

MR. KLONSKY: Do you have an extra copy?

MR. BLANC: No, I don't.

You can look at this one if you like. This

57gta

AFTERNOON SESSION

(2:30 p.m.)

THE COURT: I have read the Hartnett case, I guess, which is the grain case from Buffalo. I have read the opinion of the Court of Appeals.

In a situation very similar to our own, the Court of Appeals approved an equal division of liability as between parties who correspond to ITO and Hoffman here.

It is a 1970 case and the records are presumably in a warehouse so that I have no idea what the judgment looked like.

At any rate, it seems clear that the judgment which has already been entered against the shipowner, Oldendorff, for $310,250 should stand.

If Oldendorff does not pay that judgment, then of course Oldendorff has no indemnity as against the other parties, nor will Oldendorff receive its counsel fees unless it pays the judgment.

But if the shipowner pays the judgment, then the shipowner may recover 50 per cent against ITO plus 50 per cent of counsel fees, and may recover 50 per cent against Hoffman plus 50 per cent of counsel fees.

58gta

There may be judgment for $310,250 against Hoffman. If Hoffman pays the judgment, Hoffman is entitled to recover 50 per cent ITO and an appropriate judgment may reflect that.

All other claims and cross claims or any claims, cross claims, counterclaims inconsistent with this are dismissed.

The parties may either agree on the form of judgment or judgments or they may submit them on notice.

I don't think we need to do anything else.

MR. SCHWARTZ: I would like to, before we conclude, your Honor, having talked to Mr. Blanc, there is something that is left open here which lends itself to some disposition by your Honor.

Mr. Blanc and I have agreed -- have we not, Mr. Blanc? -- that this crane and whatever came with it was ordered from Hoffman by ITO as the customer.

MR. BLANC: Correct.

MR. SCHWARTZ: And with that in mind, your Honor, I respectfully, knowing that your Honor has pretty much disposed of the claims, call your Honor's attention to the fact that in our answer ITO has a cross claim against Hoffman for breach of its

59gta

expressed and implied warranties to us with respect to the operation of the crane that we ordered from them, and I say to your Honor most respectfully that having been case into liability under the Rodriquez case because of the negligence of our own employee, that in equity and in conscience and under the law we should be entitled to indemnity from Hoffman because it, by its actions, has cast us into liability for whatever we are called upon to pay in this case.

THE COURT: No, you are not entitled to anything.

I don't believe there was any express or implied warranties from Hoffman and you are entitled to nothing and will take nothing as against Hoffman, because I want to leave and I think my dictated result will leave 50 per cent of the liability on ITO and 50 per cent on Hoffman.

I still don't know the technical or admiralty forms of the formal judgment papers or decree.

MR. SCHWARTZ: At lunch, with the exception of Mr. Blanc, Mr. Klonsky, Mr. Cichanowicz and I kicked around the form of a judgment that might carry into execution your Honor's disposition, even though I respectfully disagree with my not having a right over

60gta

as against Hoffman.

If we can go off the record and use that blackboard for a moment, if your Honor wishes to spend the time, perhaps we can agree on a form of judgment.

THE COURT: All right. Certainly. I will contribute my energy and strength if it will help in any way.

(Discussion off the record.)

MR. CICHANOWICZ: Your Honor, may I note an exception to the portion of your Honor's ruling in which apparently counsel fees, defendant's counsel fees, are contingent upon the defendant paying the judgment.

THE COURT: All right.

I think I have done as much as I can do.

All right, Mr. Clerk, we will be in recess.

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DISTRICT COURT
FILED
MAR 25 1976
S.D.OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENITO LOPEZ,

Plaintiff,

-against-

EGAN OLDENDORF,

Defendant and Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., HOFFMAN RIGGING AND CRANE SERVICE, INC. and PAAL WILSON & CO., A.S.,

Third-Party Defendants.

69 CIVIL 1755 (IBW)

JUDGMENT

#76,270

BENITO LOPEZ,

Plaintiff,

-against-

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

Defendants.

This action initially came on for trial before the Court and a jury, Honorable Inzer B. Wyatt, United States District Judge, presiding, and leave granted plaintiff to amend his complaint for a non-jury action in negligence against Hoffman Rigging & Crane Service, Inc., and the Court having instructed the jury to find a special verdict and also

answer certain interrogatories, and the jury having duly rendered a verdict and having made answer to said interrogatories, and the Court in an oral opinion on March 5, 1976 having sustained the jury's verdict and the jury's answers to the special interrogatories, memos thereon endorsed and filed on March 8, 1976, and the Court having heard further testimony and having made further findings of fact, and conclusions of law on the non-jury aspects, the third-party plaintiffs and third-party defendants having waived trial by jury on their claims and cross-claims, it is

ORDERED and ADJUDGED that the plaintiff, BENITO LOPEZ, recover of the defendants, EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC., the sum of $310,250.00 with interest from February 19,1976 and his costs of the actions, jointly and severally and it is further, Ordered that the judgment #76,143, previously entered be hereby vacated, and it is further

ORDERED and ADJUDGED that the defendant and third-party plaintiff, EGAN OLDENDORF, if it pays the judgment herein, be fully indemnified by the third-party defendants, INTERNATIONAL TERMINAL OPERATING CO.,INC. and HOFFMAN RIGGING & CRANE SERVICE,INC., each for the sum of $155,125.00 together with interest thereon, and one half the sum to be taxed as costs in favor of the plaintiff, BENITO LOPEZ, ~~and one half the sum awarded to defendant and third-party plaintiff, EGAN OLDENDORF, as counsel fees, costs and disbursements.~~ and it is further,

ORDERED and ADJUDGED that the defendant HOFFMAN RIGGING & CRANE SERVICE,INC., if it pays the judgment herein, recover of the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO.,INC., the

DI COSTANZO, KLONSKY & CUTRONA, P.C. • COUNSELORS AT LAW • PROCTORS IN ADMIRALTY
SIXTY SIX COURT STREET • BROOKLYN, NEW YORK 11210

sum of $155,125.00 together with interest thereon and one half the sum to be taxed as costs in favor of the plaintiff, BENITO LOPEZ, against said defendant, and it is further,

ORDERED and ADJUDGED that the action by EGAN OLDENDORF, defendand and third-party plaintiff, against PAAL WILSON & CO.,A.S. be and is hereby discontinued without prejudice, and it is further,

ORDERED and ADJUDGED that the various cross-claims interposed by the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO.,INC., against HOFFMAN RIGGING & CRANE SERVICE,INC. and PAAL WILSON & CO.,A.S. and the counterclaim of INTERNATIONAL TERMINAL OPERATING CO.,INC. interposed against the shipowner, EGAN OLDENDORF, are dismissed, and it is further,

ORDERED and ADJUDGED that the cross-claims interposed by defendant and third-party defendant, HOFFMAN RIGGING & CRANE SERVICE,INC against PAAL WILSON & CO.,A.S. and the counterclaim of HOFFMAN RIGGING & CRANE SERVICE,INC. interposed against the shipowner, EGAN OLDENDORF, are dismissed.

JUDGMENT ENTERED - 3/25/76

DATED: ~~Brooklyn~~, New York
March 25, 1976

Raymond F. Burghardt
Clerk

Approved:

Inger B Lloyall
U.S.D.J.

Service of 1 copies of this within
Writ Affidavit is admitted this
14 day of July 1976
Costanza, Hendrix, Cartano, P.C.
ATTORNEYS FOR Appellee Lopez

Cochran & Carlson
Attorneys for Appellant Appellee, Gene Woodard

Hill Betts & Nash
Attorneys for Appellant Appellee, Hoffman Lighting Co.